(26,243)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1917.**

## No. 776.

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AMERICAN FIRE INSURANCE COMPANY, PLAINTIFF IN ERROR,

*vs.*

KING LUMBER & MANUFACTURING COMPANY.

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**IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.**

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INDEX.



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1917.

1 Be it remembered that on the 25th day of August, A. D. 1916, at a regular term of the Supreme Court of the State of Florida, came the plaintiff in error, American Fire Insurance Company, a corporation, by counsel and filed in the Clerk's office of the Supreme Court of Florida a transcript of the record of the proceedings and judgment of the Circuit Court of the State of Florida in and for the County of De Soto in a certain cause wherein King Lumber & Manufacturing Company, a corporation, was plaintiff and American Fire Insurance Company, a corporation, was defendant, and of the writ of error therein from the final judgment of the Circuit Court therein rendered, which said transcript of the record of the cause aforesaid and subsequent proceedings to judgment and writ of error thereto is in the words and figures as follows, to-wit:

2 Transcript of Record of Proceedings in the Circuit Court of De Soto County, Florida, in the suit of King Lumber & Manufacturing Company, a corporation, plaintiff, vs. the American Fire Insurance Company, a corporation, defendant, therein lately pending.

On the 30th day of September, 1914, the plaintiff filed its amended declaration in the words and figures following, to-wit:

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida, in and for De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Incorporated under the Laws of the State of Florida,

vs.

THE AMERICAN FIRE INSURANCE COMPANY, a Foreign Corporation.

Damages $4,000.00.

The King Lumber & Manufacturing Company, a corporation incorporated under the laws of the State of Florida, by Treadwell & Treadwell, its attorneys, sues The American Fire Insurance Company, a foreign corporation.

For that for and in consideration of $374.74 to it in hand paid, and payment acknowledged, the said defendant issued to plaintiff its two certain policies of insurance on the 8th day of April, 1912, and thereby promised the plaintiff in the terms of the said policies and upon the conditions therein annexed to insure the said plaintiff against loss or damage by fire to the amount of $2,500.00 by each of said policies, both aggregating $5,000.00, and to make good unto said plaintiff the loss or damage that should happen by fire, not exceeding said sum mentioned in each of said policies, to-wit, the

sum of $2,500.00, aggregating $5,000.00, one of said policies being for the term of one year from the 14th day of April, 1912, and the other policy being for the term of one year from the 27th day of April, 1912, the first policy of the last above mentioned expiring April 14, 1913, and the other policy expiring April 27, 1913, and being on certain property described in the two said insurance
3 policies, copies of which are hereto attached and made a part of this plaintiff's declaration and marked exhibits A and B and prayed to be taken as a part hereof as fully as if the same were particularly herein set forth, and it was provided in and by said policies that in case of loss the same was to be paid within sixty days after due notice and proof was made by plaintiff and received by defendant, and in said policies sundry provisions, conditions, prohibitions and stipulations were and are contained and thereto annexed as will be shown by said copies hereto attached as aforesaid, and afterwards, to-wit, on November 27, 1912, part of said property so assured in said policies described was burned and destroyed by fire, or partly burned and destroyed by fire and damage and loss was thereby accrued to plaintiff to the amount of $21,028.17 in such circumstances as to come within the promise and undertaking of said policies, a particular description of the property so destroyed and burned by fire & proofs thereof and the property damaged and burned by said fire and which was insured by such policies will be shown by a statement of the same hereto attached and made a part hereof and marked exhibits C & D and prayed to be taken as part of the plaintiff's declaration.

Plaintiff further shows that in and by said policies it is provided that there was $45,750.00 insurance on said property described in said policies and that said defendant should only be liable for its pro rata share of any loss caused by fire under the provisions of said policies. Plaintiff further shows that on the date of said fire there was $45,750.00 insurance on said property described in said policies, including the amount of the policies of defendant, and that the loss sustained by plaintiff by said fire was $21,028.17, and that defendant's pro rata share of said loss under each of said policies was $1,149.08, and that defendant's pro rata share of said loss under both of said policies was $2,298.16.

Plaintiff further shows that said loss by fire to plaintiff's property was such as to render liable and oblige the said defendant to pay unto the plaintiff its pro rata share of said loss, to-wit, the sum of $2,298.16, on the property aforesaid, of which loss the de-
4 fendant had due notice by proof duly made on December 16, 1912.

Plaintiff further shows that the value placed upon all the items 2, 4, 6, 8, 10, 12 and 13 of the schedule attached to said policies and the property described therein was not greater than three fourths of the value of each item so destroyed by said fire, said valuation being based upon its value immediately preceding said fire.

Plaintiff further shows that although all conditions have been performed and fulfilled and all events and things existed and happened and all periods of time have elapsed to entitle the plaintiff to a performance by the defendant of said contract of insurance and to entitle

plaintiff to the said sum of $2,298.16, and nothing has occurred to prevent plaintiff from maintaining this action, still the defendant has not paid nor made good to the said plaintiff said amount of loss and damage aforesaid or any part thereof, but refuses so to do.

Plaintiff further shows and states the fact to be that at the time of the issuance of said policies, plaintiff was the unconditional and sole owner of the property insured.

Plaintiff further shows that by reason of said defendant's refusal and failure to pay said sum of money, due as aforesaid under said policies, that said plaintiff has been forced to employ attorneys to represent it in this suit, and plaintiff claims and demands of defendant the sum of $400.00 as reasonable attorneys' fees to be allowed plaintiff's said attorneys for services in its behalf in this cause.

Therefore plaintiff brings this its suit and claims the sum of $4,000.00 damages in this behalf sustained.

TREADWELL & TREADWELL,
*Attorneys for Plaintiff.*

(Here follow policies marked pages 5 and 6.)

CHART

TOO

LARGE

FOR

FILMING

*Sworn Statement to the American Fire Insurance Co. of Philadelphia, in Proof of Loss under its Policy Number* 15565.

Expiring April 27, 1913.

Issued at its agency at Philadelphia to King Lumber and Manufacturing Co. (hereinafter called the Assured) for ($2500.) Twenty-five Hundred 00/100 Dollars, as set forth on the reverse side hereof under Schedule "A," which is an exact copy of the written portion of said policy and all endorsements, transfers and assignments that have been made thereon or attached thereto.

The Affiant does hereby declare on oath, that by fire occurring about 11:15 A. M. on November 27, 1912, which said fire was not caused by any act, procurement or design of the Assured or this Affiant, nor by any of the perils excepted by or not insured against under said policy, but originating in Cause unknown; fire discovered on roof of veneer mill (state in what building and in what part of the building and from what cause the fire originated), the said Assured has sustained loss and damage as set forth in Schedule "B," attached hereto and made a part thereof, which schedules correctly state, in detail, the Actual Cash Value of each specific subject described and insured under said policy, the Total Insurance Thereon and the Loss and Damage Thereto, for which the Assured claims and agrees to accept in full satisfaction of all claims under said policy, by reason of said fire, the sum of ($1149.08) Eleven Hundred Forty-nine 08/100 Dollars.

The Affiant does further declare on oath that the total insurance covering, at the time of said fire, in whole or in part, on any of the within described and insured property, including the above and all other policies, binders or other agreements to insure, whether valid or invalid, was $45,750, and no more, as set forth in Schedule "C," attached hereto and made a part hereof.

The building insured or containing the property insured was occupied at time of fire by Assured as veneer mill (state by whom and for what purpose each part of building was occupied).

There has been no change in the use or occupancy of or the exposure to said premises nor any change in the Assured's title, use, or possession of, or incumbrance on any of said insured property, since the issue of said policy, except, (if none so state) (Mortgage to W. G. Wells dated 1906) None.

At and from the time said policy was issued, to and at the time said fire occurred, the Assured's Title to all the buildings described as insured hereunder and the ground upon which said buildings were situated, was that of sole and unconditional owner in fee simple, and there was, and is now, no lien, mortgage or incumbrance of any nature upon any of said insured property, and no other person than the Assured has any interest therein, except mortgage to W. G. Wells (if there are any liens or incumbrances, state amounts and to whom payable).

The Affiant further declares that nothing has been done by or with the Assured's or his Affiant's privity or consent to violate the

conditions of said policy, and that no articles are included in the annexed schedules that did not belong to the Assured and were not contained in the said buildings and damaged or destroyed by said fire, that no property saved has been concealed and that no attempt has been made to deceive the insurer in any manner as to the cause or extent of said loss.

And the Assured does hereby agree that any further information that may be required will be furnished on demand, and that the furnishing of this blank and / or the preparing of any schedules or statements of said loss by any representative of the insuring company is an act of courtesy to the Assured, and shall not be construed or pleaded as an admission of liability on its part or a waiver of any of the conditions of said policy.

KING LUMBER & MFG. CO.,
*Assured,*

Per —— ——,
*Sec. & Gen. Mgr.*

Dated at Nocatee, Fla., Dec. 16, 1912.

Subscribed and sworn to before me, a Notary Public, in and for the County of De Soto, State of Florida, the day and year next above written.

[SEAL.] A. B. STROUD,
*N. P.*

My commission expires April 14, 1915.

EXHIBIT "C."

*Schedule "A"—Policy Form.*

Below must be given a complete copy of the written or printed form describing the property insured, together with all clauses, endorsements and assignments, whether they are written on the policy or on forms attached thereto.

If policies are not concurrent, copies of all forms attached to the non-concurrent policies covering in whole or in part on the same property must also be attached hereto.

Schedule "B." Statement of "Actual Cash Value" of Property Insured and Loss and Damage Thereto.

*Statement of Loss—King Lumber & Mfg. Company, Nocatee, Fla. Fire of November 27th, 1912, 11.15 A. M. Cause, unknown; discovered on roof of veneer mill.*

| | | | |
|---|---|---|---|
| Item 1. | Not involved. | | |
| Item 2. | Machinery saw mill, value $12,000.00—ins..... | $8,500.00 | |
| | Loss and damage, machinery in yard and Companies pay..... | | 475.00 |
| | ¾ value clause does not reduce payments. | | |
| Item 3. | Not involved. | | |
| Item 4. | Not involved. | | |
| Item 5. | Veneer building, 64 x 145 x 28 ft. and additions. Cost to rebuild per estimate..... | $4,724.38 | |
| | Less dep. 25%..... | 1,181.09 | |
| | Sound value and loss..... | 3,543.29 | |
| | Insurance and Companies pay..... | | 2,500.00 |
| | ¾ value clause does not reduce payments. | | |
| Item 6. | Veneer mill machinery. | | |
| | Total schedule, present prices..... | $22,901.50 | |
| | Less dep. 25% (6 yrs. old)..... | 5,725.37 | |
| | Sound value and loss..... | 17,176.13 | |
| | Less ¼ for ¾ value clause..... | 4,294.03 | |
| | Insurance, $13,750.00, Companies pay..... | | 12,882.10 |
| Item 8. | Boilers, sound value..... | $4,500.00 | |
| | Loss and damage in detail..... | 526.40 | |
| | Insurance $500.00, Companies pay..... | | 500.00 |
| | ¾ value clause does not reduce payment. | | |

| | | | |
|---|---|---|---|
| Item 9. | Not involved. | | |
| Item 10. | Not involved. | | |
| Item 11. | Stock in cars, sheds, platforms, and in outside premises. | | |
| | Inventory in sheds before fire | 957.50 | |
| | 15000′ lumber @ $15.00 | 225.00 | |
| | 12000′ logs and blocks @ $10 | 120.00 | |
| | Blocks and board ends, fuel for sale | 50.00 | |
| | Full capacity, stock in ten veneer racks @ $139 | 1,390.00 | |
| | Lumber at mill, per inventory after fire: | | |
| | 30000′ No. 3 common rough @ $7.50 | 225.00 | |
| | 70000′ Rough & dressed @ 14.00 | 980.00 | |
| | Sound value | 3,947.50 | |
| | Value saved, per inventory | 1,205.00 | |
| | Loss and damage | 2,742.50 | |
| | Insurance $2,500.00, Companies pay | | 2,171.07 |
| | Insurance required by 80% co-insurance clause | 3,158.00 | |
| | Actually carried | 2,500.00 | |
| | Assured co-insurer | 658.00 | |
| | The $2,500.00 insurance pays | $2,171.07 | |
| | The $658.00 co-insurance | 571.43 | |
| | Loss and damage | 2,742.50 | |
| Item 12. | Not involved. | | |
| Item 13. | Stock in veneer mill. | | |
| | Inventory Nov. 1st, 1912 | $14,687.63 | |
| | Mds. per daily reports | 4,968.06 | |
| | | 19,655.69 | |

| | | | |
|---|---|---|---|
| Add stock in process, estimated | | 1,285.00 | |
| | | 20,940.69 | |
| Less sales, per books | 8,783.50 | | |
| Less inventory in sheds | 957.50 | | |
| Less inventory in W. Ho | 7,453.54 | | |
| | | 17,194.54 | |
| Sound value and loss | | 3,746.15 | |
| Insurance $2,500.00, Companies pay | | | 2,500.00 |
| 80% co-insurance clause does not reduce payment. | | | |

**Summary.**

| Item | Value. | Loss. | Insurance. | Pays. |
|---|---|---|---|---|
| 2 | 12,000.00 | 475.00 | 8,500.00 | 475.00 |
| 5 | 3,543.29 | 3,543.29 | 2,500.00 | 2,500.00 |
| 6 | 17,176.13 | 17,176.13 | 13,750.00 | 12,882.10 |
| 8 | 4,500.00 | 526.40 | 500.00 | 500.00 |
| 11 | 3,947.50 | 2,742.50 | 2,500.00 | 2,171.07 |
| 13 | 3,746.15 | 3,746.15 | 2,500.00 | 2,500.00 |
| Total insurance $43,750.00—all policies concurrent | | | | 21,028.17 |

$1,000.00 Pays $459.63.

KING LUMBER & MANUFACTURING COMPANY.

*King Lumber Company, Nocatee, Florida—Fire of November 27th, 1912.*

*Insurance and Apportionment.*

| | Company and number. | Expiration. | Insures. | Pays. |
|---|---|---|---|---|
| 56,312 | American Union of Phila | 1— 1—13 | 1,000.00 | 459.63 |
| 164,864 | " " " " | 10—21—13 | 500.00 | 229.82 |
| 15,564 | " Fire, Phila | 4—14—13 | 2,500.00 | 1,149.08 |
| 15,565 | " " " | 4—27—13 | 2,500.00 | 1,149.08 |
| 57,301 | Citizens, Baltimore | 8—18—13 | 1,000.00 | 459.63 |
| 23,893 | Federal Underwriters, D. C | 11—16—13 | 1,500.00 | 689.45 |
| 85,144 | Fireman's Fund | 3—25—13 | 3,500.00 | 1,608.72 |
| 129,856 | " " | 5—10—13 | 2,500.00 | 1,149.08 |
| 129,867 | " " | 9—28—13 | 1,500.00 | 689.45 |
| 129,847 | " " | 5—10—13 | 1,250.00 | 574.53 |
| 3,167 | Hamburg Bremen | 10— 7—13 | 1,000.00 | 459.63 |
| 3,180 | " " | 10—27—13 | 1,500.00 | 689.45 |
| 716,522 | National of Hartford | 2—21—13 | 2,500.00 | 1,149.08 |
| 478,637 | New Brunswick, N. J | 10—27—13 | 2,000.00 | 919.26 |
| 755,732 | Nassau | 2—26—13 | 1,500.00 | 689.45 |
| 2,202,265 | National General, London | 11—16—13 | 2,750.00 | 1,263.99 |
| 2,103,594 | " " " | 11—18—13 | 3,750.00 | 1,723.63 |
| 2,103,595 | " " " | 11—16—13 | 1,250.00 | 574.53 |
| 70,977 | Palatine | 5— 2—13 | 1,500.00 | 689.45 |
| 197,702 | People's National, Phila | 4—21—13 | 1,500.00 | 689.45 |
| 152,223 | " " " | 7—25—13 | 1,500.00 | 689.45 |
| 51,691 | Sun of N. O | 5— 8—13 | 1,250.00 | 574.53 |
| 4,214,776 | Scottish Un. N | 12—10—12 | 1,750.00 | 804.36 |

| | | | | |
|---|---|---|---|---|
| 4,322,843 | " " | 10—19—13 | 1,750.00 | 804.36 |
| 4,191,690 | " " | 5—19—13 | 1,500.00 | 689.45 |
| 3,754,931 | London Assurance | 2—12—13 | 1,000.00 | 459.63 |
| | Totals | | 45,750.00 | 21,028.17 |

$1,000.00 Pays $459.63.

All policies concurrent, using printed form schedule.

Schedule "C." The "Total Insurance" thereon and the "Amount Claimed" under each policy.

State whether all policies are concurrent and list all policies in alphabetical order, giving the expiration of each.

Claim No.....

Sworn Statement
in
Proof of Loss
to the

.....
..... Insurance Co.
of .....
Assured .....
.....
Agency .....
Date of Fire.....
Policy No. .....
Amount of Policy $.....
Amount Claimed $.....
Less Discount $.....
Amount Paid $.....
Adjustment Expense $.....

8 *Sworn Statement to the American Fire Insurance Co. of Philadelphia, in Proof of Loss under its Policy Number* 15564.

Expiring Apl. 14, 1913.

Issued at its agency at Philadelphia to King Lumber and Manufacturing Co. (hereinafter called the Assured) for ($2500.) Twenty-five Hundred 00/100 Dollars, as set forth on the reverse side hereof under Schedule "A," which is an exact copy of the written portion of said policy and all endorsements, transfers and assignments that have been made thereon or attached thereto.

The affiant does hereby declare on oath, that by fire occurring about 11:15 A. M. on November 27, 1912, which said fire was not caused by any act, procurement or design of the Assured or this Affiant, nor by any of the perils excepted by or not insured against under said policy, but originating in Cause unknown; fire discovered on roof of veneer mill (state in what building and in what part of the building and from what cause the fire originated), the said Assured has sustained loss and damage as set forth in Schedule "B," attached hereto and made a part thereof, which schedules correctly state, in detail, the Actual Cash Value of each specific subject described and insured under said policy, the Total Insurance Thereon and the Loss and Damage Thereto, for which the Assured claims and agrees to accept in full satisfaction of all claims under said policy, by reason of said fire, the sum of ($1149.08) Eleven Hundred Forty-nine 08/100 Dollars.

The Affiant does further declare on oath that the total insurance covering, at the time of said fire, in whole or in part, on any of the within described and insured property, including the above and all other policies, binders or other agreements to insure, whether valid or invalid, was $45,750, and no more, as set forth in Schedule "C," attached hereto and made a part hereof.

The building insured or containing the property insured was occupied at time of fire by Assured as veneer mill (state by whom and for what purpose each part of building was occupied).

There has been no change in the use or occupancy of or the exposure to said premises nor any change in the Assured's title, use, or possession of, or incumbrance on any of said insured property, since the issue of said policy, except, (if none so state) (Mortgage to W. G. Wells dated 1906) None.

At and from the time said policy was issued, to and at the time said fire occurred, the Assured's Title to all the buildings described as insured hereunder and the ground upon which said buildings were situated, was that of sole and unconditional owner in fee simple, and there was, and is now, no lien, mortgage or incumbrance of any nature upon any of said insured property, and no other person than the Assured has any interest therein, except mortgage to W. G. Wells (if there are any liens or incumbrances, state amounts and to whom payable).

The Affiant further declares that nothing has been done by or with the Assured's or his Affiant's privity or consent to violate the conditions of said policy, and that no articles are included in the annexed schedules that did not belong to the Assured and were not contained in the said buildings and damaged or destroyed by said fire, that no property saved has been concealed and that no attempt has been made to deceive the insurer in any manner as to the cause or extent of said loss.

And the Assured does hereby agree that any further information that may be required will be furnished on demand, and that the furnishing of this blank and / or the preparing of any schedules or statements of said loss by any representative of the insuring company is an act of courtesy to the Assured, and shall not be construed or pleaded as an admission of liability on its part or a waiver of any of the conditions of said policy.

KING LUMBER & MFG. CO.,
*Assured,*

Per —— ——,
*Sec. & Gen. Mgr.*

Dated at Nocatee, Fla., Dec. 16, 1912.

Subscribed and sworn to before me, a Notary Public, in and for the County of De Soto, State of Florida, the day and year next above written.

[SEAL.] A. B. STROUD,
*N. P.*

My commission expires April 14, 1915.

## EXHIBIT "D."

*Schedule "A"—Policy Form.*

Below must be given a complete copy of the written or printed form describing the property insured, together with all clauses, endorsements and assignments, whether they are written on the policy or on forms attached thereto.

If policies are not concurrent, copies of all forms attached to the non-concurrent policies covering in whole or in part on the same property must also be attached hereto.

Schedule "B." Statement of "Actual Cash Value" of Property Insured and Loss and Damage Thereto.

*Statement of Loss—King Lumber & Mfg. Company, Nocatee, Fla. Fire of November 27th, 1912, 11.15 A. M.*
*Cause, unknown; discovered on roof of veneer mill.*

| | | | |
|---|---|---|---|
| Item 1. | Not involved. | | |
| Item 2. | Machinery saw mill, value $12,000.00—ins | $8,500.00 | |
| | Loss and damage, machinery in yard and Companies pay | | 475.00 |
| | ¾ value clause does not reduce payments. | | |
| Item 3. | Not involved. | | |
| Item 4. | Not involved. | | |
| Item 5. | Veneer building, 64 x 145 x 28 ft. and additions. Cost to rebuild per estimate | $4,724.38 | |
| | Less dep. 25% | 1,181.09 | |
| | Sound value and loss | 3,543.29 | |
| | Insurance and Companies pay | | 2,500.00 |
| | ¾ value clause does not reduce payments. | | |
| Item 6. | Veneer mill machinery. | | |
| | Total schedule, present prices | $22,901.50 | |
| | Less dep. 25% (6 yrs. old) | 5,725.37 | |
| | Sound value and loss | 17,176.13 | |
| | Less ¼ for ¾ value clause | 4,294.03 | |
| | Insurance, $13,750.00, Companies pay | | 12,882.10 |
| Item 8. | Boilers, sound value | $4,500.00 | |
| | Loss and damage in detail | 526.40 | |
| | Insurance $500.00, Companies pay | | 500.00 |
| | ¾ value clause does not reduce payment. | | |

| | | | |
|---|---|---|---|
| Item 9. | Not involved. | | |
| Item 10. | Not involved. | | |
| Item 11. | Stock in cars, sheds, platforms, and in outside premises. | | |
| | Inventory in sheds before fire | 957.50 | |
| | 15000′ lumber @ $15.00 | 225.00 | |
| | 12000′ logs and blocks @ $10 | 120.00 | |
| | Blocks and board ends, fuel for sale | 50.00 | |
| | Full capacity, stock in ten veneer racks @ $139 | 1,390.00 | |
| | Lumber at mill, per inventory after fire: | | |
| | 30000′ No. 3 common rough @ $7.50 | 225.00 | |
| | 70000′ Rough & dressed @ 14.00 | 980.00 | |
| | Sound value | 3,947.50 | |
| | Value saved, per inventory | 1,205.00 | |
| | Loss and damage | 2,742.50 | |
| | Insurance $2,500.00, Companies pay | | 2,171.07 |
| | Insurance required by 80% co-insurance clause | 3,158.00 | |
| | Actually carried | 2,500.00 | |
| | Assured co-insurer | 658.00 | |
| | The $2,500.00 insurance pays | $2,171.07 | |
| | The $658.00 co-insurance | 571.43 | |
| | Loss and damage | 2,742.50 | |
| Item 12. | Not involved. | | |
| Item 13. | Stock in veneer mill. | | |
| | Inventory Nov. 1st, 1912 | $14,687.63 | |
| | Mds. per daily reports | 4,968.06 | |
| | | 19,655.69 | |

| | | | |
|---|---|---|---|
| Add stock in process, estimated | | 1,285.00 | |
| | | 20,940.69 | |
| Less sales, per books | 8,783.50 | | |
| Less inventory in sheds | 957.50 | | |
| Less inventory in W. Ho | 7,453.54 | | |
| | | 17,194.54 | |
| Sound value and loss | | 3,746.15 | |
| Insurance $2,500.00, Companies pay | | | 2,500.00 |

80% co-insurance clause does not reduce payment.

| Summary. | Value. | Loss. | Insurance. | Pays. |
|---|---|---|---|---|
| Item 2 | 12,000.00 | 475.00 | 8,500.00 | 475.00 |
| 5 | 3,543.29 | 3,543.29 | 2,500.00 | 2,500.00 |
| 6 | 17,176.13 | 17,176.13 | 13,750.00 | 12,882.10 |
| 8 | 4,500.00 | 526.40 | 500.00 | 500.00 |
| 11 | 3,947.50 | 2,742.50 | 2,500.00 | 2,171.07 |
| 13 | 3,746.15 | 3,746.15 | 2,500.00 | 2,500.00 |
| Total insurance $43,750.00—all policies concurrent | | | | 21,028.17 |

$1,000.00 Pays $459.63.

*King Lumber Company, Nocatee, Florida—Fire of November 27th, 1912.*

*Insurance and Apportionment.*

| | Company and number. | Expiration. | Insures. | Pays. |
|---|---|---|---|---|
| 56,312 | American Union of Phila | 1— 1—13 | 1,000.00 | 459.63 |
| 164,864 | " " " " | 10—21—13 | 500.00 | 229.82 |
| 15,564 | " Fire, Phila | 4—14—13 | 2,500.00 | 1,149.08 |
| 15,565 | " " " | 4—27—13 | 2,500.00 | 1,149.08 |
| 57,301 | Citizens, Baltimore | 8—18—13 | 1,000.00 | 459.63 |
| 23,893 | Federal Underwriters, D. C. | 11—16—13 | 1,500.00 | 689.45 |
| 85,144 | Fireman's Fund | 3—25—13 | 3,500.00 | 1,608.72 |
| 129,856 | " " | 5—10—13 | 2,500.00 | 1,149.08 |
| 129,867 | " " | 9—28—13 | 1,500.00 | 689.45 |
| 129,847 | " " | 5—10—13 | 1,250.00 | 574.53 |
| 3,167 | Hamburg Bremen | 10— 7—13 | 1,000.00 | 459.63 |
| 3,180 | " " | 10—27—13 | 1,500.00 | 689.45 |
| 716,522 | National of Hartford | 2—21—13 | 2,500.00 | 1,149.08 |
| 478,637 | New Brunswick, N. J. | 10—27—13 | 2,000.00 | 919.26 |
| 755,732 | Nassau | 2—26—13 | 1,500.00 | 689.45 |
| 2,202,265 | National General, London | 11—16—13 | 2,750.00 | 1,263.99 |
| 2,103,594 | " " " | 11—18—13 | 3,750.00 | 1,723.63 |
| 2,103.595 | " " " | 11—16—13 | 1,250.00 | 574.53 |
| 70,977 | Palatine | 5— 2—13 | 1,500.00 | 689.45 |
| 197,702 | People's National, Phila. | 4—21—13 | 1,500.00 | 689.45 |
| 152,223 | " " " | 7—25—13 | 1,500.00 | 689.45 |
| 51,691 | Sun of N. O. | 5— 8—13 | 1,250.00 | 574.53 |
| 4,214,776 | Scottish Un. N. | 12—10—12 | 1,750.00 | 804.36 |

| | | | | | |
|---|---|---|---|---|---|
| 4,322,843 | " | " | 10—19—13 | 1,750.00 | 804.36 |
| 4,191,690 | " | " | 5—19—13 | 1,500.00 | 689.45 |
| 3,754,931 | London Assurance | | 2—12—13 | 1,000.00 | 459.63 |
| | Totals | | | 45,750.00 | 21,028.17 |

$1,000.00 Pays $459.63.

All policies concurrent, using printed form schedule.

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida in and for De Soto County.

KING LUMBER & MANUFACTURING COMPANY, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, Defendant.

Now comes the plaintiff, by Treadwell & Treadwell, its attorneys, and demurs to the second plea filed by defendant to plaintiff's declaration on the 29th day of October, A. D. 1914, and for substantial matters of law to be argued to the Court at the hearing thereof says:

First, that the matters and things set forth in said second plea do not constitute a defense to plaintiff's action against said defendant.

Second, the facts set up in said second plea are not sufficient to defeat plaintiff's cause of action against the defendant.

Third, and for other good and sufficient reasons appearing upon the face of said plea.

TREADWELL & TREADWELL,
*Attorneys for Plaintiff.*

We hereby certify that in our opinion the above and foregoing demurrer is well founded in law.

TREADWELL & TREADWELL,
*Attorneys for Plaintiff.*

STATE OF FLORIDA,
*County of De Soto:*

Before me, the undersigned authority, personally appeared E. D. Treadwell, who, on oath, says that he is one of the attorneys for the King Lumber & Manufacturing Company, and that the above and foregoing demurrer is filed in good faith and not for the purpose of delay.

E. D. TREADWELL.

Sworn to and subscribed before me on this 5th day of December, A. D. 1914.

[SEAL.]

A. MARIE McCREADY,
*Notary Public, State of Florida.*

My Commission expires May 14, 1916.

12 On the 5th day of January, 1915, the plaintiff filed its replication to a portion of the defendant's first plea in the words and figures following, to-wit:—

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida in and for De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the King Lumber & Manufacturing Company, a corporation, by Treadwell & Treadwell, its attorneys, and for replication to that part of the first plea filed by defendant on the 29th day of October, 1914, beginning with the word "and" in the thirteenth line of said plea, says:

I.

That it is true that the two fire insurance policies sued on in this cause contain the warranty set out in said plea, but plaintiff states the fact to be that Lowry & Prince, the agents of the defendant, located at Tampa, Florida, solicited said insurance evidenced by said policies from plaintiff, and when the said Lowry & Prince, agents of said defendant, delivered said policies to plaintiff, the said agents of said defendant called plaintiff's attention to said warranty clause, and stated to plaintiff that said clause did not affect the plaintiff and should be disregarded by plaintiff, and the said Lowry & Prince, agents for the defendant, gave as their reason why plaintiff should disregard said warranty clause that plaintiff at the time had in the American Central Insurance Company of St. Louis, Missouri, Sixty-five Hundred ($6500.00) Dollars of insurance covering the items insured by the policies of the defendant herein.

Repliant further says that it at the time was carrying a large amount of insurance, approximately about Forty-five Thousand ($45,000.00) Dollars, in various companies, and that it did not keep up very closely with the amount of insurance that it had in any particular company, it being careful only to keep the total amount of approximately $45,000.00 in reputable, old line companies, and that at the time of the issuance of the policies sued on in this cause and the acceptance of the same by plaintiff, plaintiff did not know the exact amount of insurance it had in the American Central Insurance Company of St. Louis, Missouri, and that it therefore relied upon the representation of the agents of the defendant, who stated that they had investigated the policies and that plaintiff had in said American Central Insurance Company of St. Louis, Missouri, Sixty-five Hundred ($6500.00) Dollars of insurance as aforesaid, on the items covered by the policies of the defendant.

Repliant further says that relying upon the representation of said agents of said defendant, and relying upon the instructions of the agents of said defendants to disregard said warranty, repliant accepted said policies and paid the agents of said defendant the premium thereon.

II.

Replying further to that portion of the first plea heretofore mentioned, repliant says:

That thereafter it was notified that a policy for Fifteen Hundred ($1500.00) Dollars in the American Central Insurance Company of St. Louis, Missouri, was cancelled by an agency at Bartow, Florida. Repliant felt no apprehension as to violation of said warranty as it still had, according to the representations of the agents of defendant Five Thousand ($5,000.00) Dollars insurance in the American Central Insurance Company of St. Louis, Missouri, on the property covered by the policies of the defendant.

Repliant further says that some time prior to July 25, 1912, Lowry & Prince, agents of said defendant, notified repliant that the American Central Insurance Company of St. Louis, Missouri, was desirous of cancelling its policy No. 303149 in the sum of Fifteen Hundred ($1500.00) Dollars, and suggested to repliant that there be substituted for the last mentioned policy a policy in a like
14 sum in the People's National Fire Insurance Company of Philadelphia. This information coming from the agents of the defendant and this suggestion having been made by the agents of the defendant, repliant agreed to the cancellation of said policy and the substitution of the policy in the People's National Fire Insurance Company of Philadelphia.

Repliant further says that some time prior to October 27, 1912, Lowry & Prince, agents of said defendant, notified repliant that the American Central Insurance Company of St. Louis, Missouri, was desirous of cancelling its policy No. 303192 in the sum of Fifteen Hundred ($1500.00) Dollars, and said agents of said defendant suggested that there be substituted for the said last mentioned policy a policy in a like amount in the American Union of Philadelphia, and said information coming from the agents of said defendant, and said suggestion being by the agents of the said defendant, repliant agreed that said last mentioned policy might be cancelled and a policy in the American Union of Philadelphia substituted therefor.

Repliant further says that in pursuance of said suggestion as soon as the policies above mentioned were cancelled said new policies were substituted in pursuance of said suggestion. Repliant denies that said policies were cancelled without the knowledge of defendant and states the fact to be as heretofore set forth that said policies were cancelled with the full knowledge and consent of Lowry & Prince, who were the agents of said defendant, acting for it in the State of Florida, and who, as such agents, had caused the policies sued on to be issued, and who, as such agents, had collected the premiums paid by repliant for said policies sued on and forwarded the same to said defendant, and that said new policies in the companies hereinbefore mentioned were substituted for the two cancelled policies with the full knowledge and consent, and at the suggestion and with the approval of Lowry & Prince, agents of said defendant as aforesaid.

Repliant further says that the defendant at all times, through its agents Lowry & Prince, had knowledge of the cancellation of said policies of the American Central Insurance Company of St. Louis,

and the substitution therefor of the policies hereinbefore mentioned; that it did not object thereto but, through its agents Lowry & Prince, approved and ratified said cancellation and substitution.

III.

Further replying to that portion of the plea hereinbefore mentioned, repliant says that it is true that said policies of the American Central Insurance Company of St. Louis, Missouri, were cancelled as in and by said plea set forth, it states the fact to be that it immediately caused to be substituted therefor policies of insurance in an equal sum in other old line Insurance companies.

IV.

Repliants further replying to that portion of the first plea heretofore mentioned, says that it is true that the said fire insurance policies sued on contain the warranty clause set forth in said plea, but repliant states the fact to be that at the time of the issuance of said policies and at all times thereafter during the life of the same, there existed a general custom among fire insurance companies and in the insurance world that a warranty such as set forth in said plea was complied with if the amount mentioned in said warranty should be carried on said property in any reputable fire insurance company or old line fire insurance company.

Repliant further says that said general business custom was in force and effect in Tampa and at Nocatee, Florida, at the time of the issuance and acceptance of said policies, and remained in force and effect during the life of said policies.

Repliant further says that it is true that the policies of the American Central Insurance Company of St. Louis, Missouri, were cancelled, but that immediately and simultaneously like policies were issued on said property in the same amount as said cancelled policies in reputable fire insurance companies or old line fire insurance companies.

Repliant further says that it at all times, in accordance with said general custom carried the amount of insurance mentioned in said warranty clause in reputable old line fire insurance companies and that the same was carried against said property at the time of the fire.

TREADWELL & TREADWELL,
*Attorneys for Repliant.*

16 On the 11th day of January, 1915, the defendant filed its demurrer to the plaintiff's replications in the words and figures following, to-wit:—

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the American Fire Insurance Company, a corporation, by James F. Glen, its attorney, and demurs to the replications of the plaintiff to the first plea of the defendant, and demurs severally to each of the said replications, and says that the said replications, and each of them, are bad in substance, and as matters of law to be argued in support of the said demurrer states the following:—

As to all of said replications—

(1.) They are vague, indefinite, uncertain and loose in their allegations, and are not responsive to the plea.

(2.) They depend upon legal conclusions not justified by allegations of fact.

As to the 1st replication—

(1.) It seeks to vary by parol the terms of an express written contract.

(2.) Lowry and Prince were without power to bind the defendant as alleged.

(3.) It seeks to modify and contradict terms assented to as evidencing the contract between the parties.

As to the 1st and 2nd replications—

If the legal predicate for the conclusion that Lowry and Prince were the agents of the defendant rests upon Section 2765 of the General Statutes of Florida, and that Section should be construed to apply under the conditions set forth in the plea, the said Statute as so construed is in violation of the Constitution of the
17 United States, and the defendant hereby specially sets up and claims that as so construed the said Statute is in violation of the Clause of Article 4 of the Constitution of the United States requiring that "Full Faith and Credit shall be given in each State to the public Acts * * * of every other State" in that the State of Florida will thereby deny full faith and credit to the laws of the State of Pennsylvania.

(*b.*) And the defendant further hereby specially sets up and claims that as so construed the said Statute is in violation of the Clause of the Fourteenth Amendment to the Constitution of the United States providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".

(*c.*) And the defendant further hereby specially sets up and claims that as so construed the said Statute is in violation of the Clause of the Fourteenth Amendment to the Constitution of the United States providing: "Nor shall any State deprive any person of life, liberty or property, without due process of law".

(*d.*) And the defendant further hereby specially sets up and claims that as so construed the said Statute is in violation of the

Clause of the Fourteenth Amendment to the Constitution of the United States providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws".

(*e.*) The defendant hereby specially sets up and claims the benefit of all the foregoing provisions of the Constitution of the United States, and further specially sets up and claims the benefit of Article 6 of the Constitution of the United States providing that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the contrary notwithstanding".

As to the 2nd replication—

(1.) Said replication does not allege any facts in issuable form and is a mere argument.

(2.) Assuming that Section 2765 could be construed so as to make Lowry and Prince agents of the defendant at the time the insurance was effected it could not constitutionally make them
18 agents of the defendant thereafter, so that notice to them, or acts done by them, thereafter would bind the defendant.

(3.) "Agents of said defendant" reiterated in the replication, and on which it depends, is a legal conclusion not supported by allegations of fact, and not justified by law when the replication is construed in connection with the plea.

(4.) The replication does not allege that Lowry and Prince were acting as agents of the defendant in respect to the matters set forth in the replication.

As to the 3rd replication:—

The subject matter thereof is wholly immaterial and irrelevant.

As to the 4th replication—

(1.) The custom set forth is repugnant to the express contracts.

(2.) The contracts were Pennsylvania contracts.

(3.) The subject matter of the replication is wholly immaterial and irrelevant.

JAMES F. GLEN,
*Attorney for Defendant.*

I hereby certify that I am the attorney for the defendant in the above stated cause and that in my opinion the foregoing demurrer as to all and each of the replications demurred to is well founded in law, and being duly sworn say that the said demurrer is not interposed for the purpose of delay.

JAMES F. GLEN.

Sworn to and subscribed before me this 9th day of January, A. D. 1915.

[SEAL.]

R. A. SCOTTI,
*Notary Public, State of Florida at Large.*

19 On the 25th day of August, 1915, the Court made an order in the words and figures following, to-wit:—

Circuit Court, De Soto County.

KING LUMBER & MFG. CO.

VS.

AMERICAN FIRE INS. CO.

This cause coming on to be heard upon motion to strike, Demurrer to second amended plea and demurrer to replications and being of opinion that the issue in part tendered by the first amended plea was whether Lowery & Prince as broker- for plintiff procured the policy and that it was not business transacted in the state and that this is a material part of the plea, and that the question of agency is not res adjudicata, the judgment on that issue being only that Lowery & Prince were agents at time of service. But also that part of the issue tendered if true, that the contract was not made in this state, raises the material question whether the statute, under which that adjudication was had, has any applicability to contracts made out of state, and I am — opinion that the statute can only be applied to contracts made in the state, hence the plea is good as obviating the effect of the statute. The motion to strike must therefore be overruled. It is therefore unnecessary to comment further on the various grounds of demurrer to the 1st replication, than to say that it should be sustained if for no other reason than that it does not fully respond to plea by presenting a complete responsive issue; that is that the contract was not made out of the state by plaintiff's brokers but was a transaction in the state by an agent of defendant who waived warranty clause & etc. The replication as it now stands seems to assume the agency as a conclusion striking the first part of the plea, by reason of the statute. I must hold however that the statute is applicable or not, according to whether the transaction was had in the state by an agent here, in which case I would regard the matters claimed as waiver of insurance clause of warranty, good reply to plea. The second and third replication is subject to same fault, tho not so much so. The fourth replication I think is bad because custom does not alter contracts, but only aids or explains ambiguities or omissions.

It is ordered that the motion to strike be overruled; demurrer to defendant's 2nd amended plea sustained; leave to amend in 15 days, after notice hereof; demurrer to replications sustained; leave to amend in 15 days after notice hereof. Exceptions noted for both parties.

F. A. WHITNEY,
*Judge.*

August 25, 1915.

On the 2nd day of October, 1915. the plaintiff filed its amended replication in the words and figures following, to-wit:—

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida, in and for De Soto County.

KING LUMBER & MANUFACTURING CO., a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the King Lumber & Manufacturing Co., a corporation, by Treadwell & Treadwell, its attorneys, and for amended replication to the first plea filed by defendant on the 29th day of October, A. D., 1914, says:

First. That it denies that at the time said policies went in force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, defendant was transacting business within the State of Florida, and was in fact transacting business with plaintiff.

That on Apr. 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of the property of the plaintiff, described in the policies
21 sued on herein, and that the said policy of Apr. 14, 1908, so written by said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted with the said Lowry and Prince as to the nature of the risk assumed, and from time to time, from Apr. 14, 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the physical condition of your repliant's property, and as to the advisability of assuming a risk thereon, and relied upon the said Lowry & Prince for its information on this subject.

And repliant further shows that the said Lowry & Prince caused the defendant to write the said first policy of 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant.

Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no Agent or representative in the State of Florida, but states the fact to be that Lowry & Prince, who procured and caused said policies to be written who collected the premiums and forwarded the same to the defendant, were the agents of the defendant.

Second. For a further replication to said first plea, repliant says that it is true that the two fire insurance policies sued on in
22 this cause contained the warranty set out in said plea. Repliant states the fact to be that Lowry & Prince, the Agents of the defendant as aforesaid, when they delivered the policies so sued on to repliant, called repliant's attention to said warranty clause, and stated to repliant that said clause would not affect repliant, and should be disregarded by repliant, and gave as their reason why said warranty clause should be disregarded, that the repliant had at that time in the American Central Insurance Company of St. Louis, Mo., Six Thousand Five Hundred Dollars ($6,500.00) of insurance, covering the items insured by the policies of the defendant sued on herein.

Repliant further says that it at that time was carrying a large amount of insurance, approximately Forty Five Thousand Dollars ($45,000.00) in various companies, and that it did not keep up very closely with the amount of insurance that it had in any particular company, being careful only to keep the total amount approximately Forty Five Thousand Dollars, in reputable old line companies, and that it therefore relied upon the representation of the said Lowry & Prince, who stated that they had investigated the policies of repliant in the said American Central Insurance Company of St. Louis, and that repliant had Six Thousand Five Hundred Dollars of insurance, as aforesaid.

Repliant further says that relying upon the representation of said Lowry & Prince, Agents of the said defendant, and relying upon their instruction to disregard said warranty, repliant accepted said policies, and paid the said Lowry & Prince the premium therefor, charged by the said defendant.

Third. Replying further to said first plea, repliant says:

That some time prior to July 25, 1912, Lowry & Prince, as Agents of the defendant aforesaid, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #303149, in the sum of One Thousand Five Hundred Dollars ($1,500.00) and suggested to repliant that there be substituted for the last mentioned policy, a policy in a like sum in the People's National Fire Insurance Company of Philadelphia.
23 This information coming from the said Lowry & Prince, the Agents of the defendant, and this suggestion having been made by the agents of the defendant, repliant agreed to the cancellation of said policy, and the substitution of a policy with the People's National Fire Insurance Company of Philadelphia.

Repliant further says that some time prior to Oct. 27, 1912, the said Lowry & Prince, the Agents as aforesaid of the said defendant notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #303192, in the sum of One Thousand Five Hundred Dollars ($1,500.00) and the said Lowry & Prince suggested that there be substituted for the said last mentioned policy, a policy in a like amount in the American Union of Philadelphia.

Said information and said suggestion being given by the Agents of said defendant as aforesaid, repliant agreed that said last men

tioned policy might be cancelled, and a policy in the American Union of Philadelphia substituted therefor.

Repliant further says that the said Lowry & Prince, Agents of the said defendant as aforesaid, assured repliant that the cancellation of policies above mentioned was not a violation of the warranty set forth in said plea, provided a like amount of insurance was carried in some other old line insurance company.

Repliant further says that as soon as said policies were cancelled, new policies were substituted in pursuance of said suggestion, in the companies above mentioned, and repliant therefore denies that said policies were cancelled without the knowledge of defendant, but says that said policies were cancelled with the full knowledge and consent, and at the suggestion of Lowry & Prince, who were the Agents of said defendant as aforesaid, acting for it in the State of Florida, who, as such agents, had caused policies sued on to be issued, and who had collected the premiums paid by repliant for said policies sued on, and forwarded the same to the said defendant, and that said defendant thereby waived said warranty clause, ratified and confirmed the cancellation of said policies of insurance in the American Central Insurance Company of St. Louis.

24 Fourth. Further replying to said first plea, repliant denies that said policies of insurance so sued on, were delivered in the State of Pennsylvania, but states the fact to be that same were delivered by Lowry & Prince, as Agents for said defendant, to repliant, within the State of Florida, and accepted by repliant within said State.

TREADWELL & TREADWELL,
*Attorneys for Plaintiff.*

On the 2nd day of October, 1915, the defendant filed its rejoinder to the plaintiff's replications in the words and figures following to-wit:

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING CO., a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the defendant, American Fire Insurance Company, a corporation, by James F. Glen, its attorney, and for a rejoinder to the replications of the plaintiff, says:—

That under the public laws of the State of Pennsylvania, which are entitled to full faith and credit in the State of Florida, the defendant is authorized to write and issue, in the State of Pennsylvania, policies of insurance on property outside the State of Pennsylvania, and in April 1908, at Philadelphia, in the State of Pennsylvania, Lowry & Prince of Tampa, Florida, with whom the defendant had no connection or relations, as brokers of the plaintiff, made application to the defendant requesting it to issue a policy insuring the property of the plaintiff situate in Florida, which the defendant did, and

thereafter, from time to time, on the written requests of the said Lowry & Prince, addressed to the defendant at Philadelphia in the State of Pennsylvania, the defendant continued to write and issue policies of insurance on the plaintiff's property, including those sued upon, but all of the said policies were written and executed by
25 the defendant in the State of Pennsylvania, and thereupon delivered and sent by mail to the said Lowry & Prince, at Tampa, Florida, as brokers of the plaintiff, and each contained a similar warranty clause as to the existence of concurrent insurance on the property with an approved designated company doing business in the State of Florida, except that, from time to time, at the request of the said Lowry & Prince, the names of the companies were changed, as companies designated cancelled their risks on the property, and the name of the American Central Insurance Company of St. Louis, Missouri, was inserted in the contracts sued on at the special request of the said Lowry & Prince, stated by the said Lowry and Prince to the defendant to be made by them because they were agents for that company and would know of any cancellations by it, while some other company they did not represent might cancel without their knowledge; that the said Lowry & Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account, to waive any provisions in the contract sued on, or to represent it in any manner, shape or form, but the plaintiff desired to secure, through them, insurance to the amount of $45,750, in accordance with a printed form prepared for the plaintiff by Lowry & Prince and annexed to the policies sued on, all of which they were unable to place with companies for which they were agents, and thereupon they transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission; and the defendant denies that by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince, for the defendant, any premiums on the policies of insurance, written by the defendant, and denies that Lowry & Prince were agents of the defendant, and denies that, prior to the furnishing of the proofs of loss by the plaintiff, it had any notice or knowledge that the
26 American Central Insurance Company of St. Louis, Missouri, had cancelled its policies on the property insured and did not carry $5,000 on the identical subject matter and risk, and denies that it advised or consulted with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject matter insured, and the companies carrying insurance thereon.

JAMES F. GLEN,
*Attorney for Defendant.*

On the 4th day of October, 1915, the plaintiff filed its demurrer to the plaintiff's rejoinder in the words and figures following, to-wit:

In the Circuit Court of the Tenth Judicial Circuit, in and for De Soto County, Florida.

KING LUMBER & MFG. CO., a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE CO., a Corporation, Defendant.

Now Comes the King Lumber & Mfg. Co., by Treadwell & Treadwell. its attorneys, and demurs to the Rejoinder filed by the defendant to the plaintiff's Replication to the defendant's plea, and says:

That said Rejoinder is bad in substance and as matters of law to be argued and urged in support of said Demurrer, states the following:

First. The matters and things set forth in said Rejoinder are not such as constitutes a defense to the cause of action urged by plaintiff in its Declaration, and the Replication filed by plaintiff to defendant's Plea.

Second. Said Rejoinder shows upon its face that the defendant at the time of the cancellation of the policies of insurance in the American Central Insurance Company of St. Louis, was doing business within the State of Florida, and that Lowry & Prince were its agents.

Third. Because the facts set forth in said Rejoinder are not sufficient in law as an answer to the matters and things set forth in plaintiff's Replication to defendant's plea.

Fourth. For other good and sufficient reasons, appearing
27 on the face of said Rejoinder.

TREADWELL & TREADWELL,
*Attorneys for Plaintiff.*

We hereby certify that we are attorneys for the King Lumber & Mfg. Co., and that in our opinion the foregoing demurrer is well founded in law.

TREADWELL & TREADWELL,
*Attorneys for King Lumber & Mfg. Co.*

STATE OF FLORIDA,
*County of De Soto:*

Before me the undersigned authority, an officer duly authorized to administer oaths, personally appeared E. D. Treadwell, who on oath says that he is attorney for the King Lumber & Mfg. Co., and that the above and foregoing demurrer is filed in good faith, and not for the purpose of delay.

E. D. TREADWELL.

Sworn to and subscribed to before me on this fourth day of October, A. D., 1915.

[SEAL.] MARY A. MOYE,
*Notary Public.*

My commission expires Dec. 18, 1918.

Demurrer sustained leave to amend if so desired.

F. A. WHITNEY,
*Judge.*

June 27—16.

28 On the 27th day of June, 1916, the Court entered judgment sustaining the plaintiff's demurrer to the defendant's rejoinder and rendering final judgment for the plaintiff in the words and figures following, to-wit:

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

This cause coming on to be heard upon the demurrer of the plaintiff to the rejoinder of the defendant to the plaintiff's replication and having been argued by counsel for the respective parties and submitted to the Court and the Court having considered the same, and the Court being of the opinion that the provisions of Section 2765 of the General Statutes of Florida are applicable and that under the said provisions the firm of Lowry and Prince must be held to be the agents of the defendant, it is, therefore, considered by the Court that the said demurrer be and the same is hereby sustained, and the defendant not desiring to plead further, it is further considered by the Court that final judgment on the said demurrer be and the same is hereby rendered in favor of the plaintiff for its damages.

And it further appearing to the Court on inquest of damages that there is due and owing on the policies sued on the sum of $2,298.16, with interest thereon at the rate of eight per cent., per annum, from February 16th, 1913, and that the sum of $300.00 would be a reasonable attorneys' fee to the attorneys of the plaintiff, it is, therefore, considered by the Court that the plaintiff, King Lumber & Manufacturing Company, a corporation, do have and recover of and from the defendant, American Fire Insurance Company, a corporation, the sum of $2,916.10, for its damages, together with the further sum of $300.00 for reasonable attorneys' fee, and also its costs in this behalf expended, to be taxed by the Clerk of this Court, and that
29 execution therefor do issue, to be levied on the goods, chattels, lands and tenements of the defendant and unto the plaintiff rendered.

Done and ordered at Arcadia, Florida, this 27th day of June, A. D. 1916.

F. A. WHITNEY,
*Judge.*

On the 30th day of June, 1916, the plaintiff filed its writ of error, which was on the same day duly recorded, in the words and figures following, to-wit:

STATE OF FLORIDA, ss:

The State of Florida to the Judge of the Circuit Court of the Tenth Judicial Circuit of the State of Florida in and for De Soto County, Greeting:

Because in the record and proceedings and also in the rendition of judgment in a certain cause which is in our said Circuit Court before you, between King Lumber and Manufacturing Company, a corporation, as Plaintiff and The American Fire Insurance Company, a corporation, as Defendant, manifest error hath happened, as it is said, to the great damage of the said The American Fire Insurance Company as by its complaint appears,

We, willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein rendered, you distinctly and openly send the record and proceedings aforesaid with all things touching them, under your seal, together with this writ, to our Supreme Court of the State of Florida, so that you have the same at Tallahassee on the 28th day of August, A. D. 1916, in our said Supreme Court to be then and there held, that inspecting the record and proceedings aforesaid, our said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law should be done.

Witness the Honorable R. Fenwick Taylor, Chief Justice of the said Supreme Court, and the seal of the said Circuit Court, this 30th day of June in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] A. L. DURRANCE,
*Clerk of the Circuit Court of De Soto County, Florida.*

30 On the —th day of July, 1916, the defendant filed its assignment of errors in the words and figures following, to-wit:—

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the defendant, American Fire Insurance Company, a corporation, by James F. Glen, its attorney, and hereby makes the following as a complete assignment of the errors it intends to rely upon in the Supreme Court of Florida for reversal of the judgment entered against it in the above stated cause, on the 27th day of June, A. D. 1916, on its writ of error sued out therefrom, viz.,

1st. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, denied full faith and credit

to the laws of the State of Pennsylvania, in violation of Section 1 of Article IV of the Constitution of the United States.

2nd. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".

3rd. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "nor shall any State deprive any person of life, liberty or property, without due process of law".

31 4th. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall deny to any person within its jurisdiction the equal protection of the Laws".

5th. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, denied to the defendant the benefit of Article VI of the Constitution of the United States which provides that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the contrary notwithstanding".

6th. The Court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the said rejoinder was a complete answer to the plaintiff's replications.

7th. The Court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the replications of the plaintiff were bad, and judgment should have been rendered against it on that ground.

8th. The Court erred in holding that the plaintiff could secure reformation of the policies sued on in a Court of Law.

9th. The Court erred in holding that Lowry and Prince had authority to abrogate the contracts represented by the policies sued on, and make new and different contracts with the plaintiff.

10th. The Court erred in holding that the plaintiff could recover upon different causes of action from those set up in its declaration.

11th. The Court erred in sustaining the demurrer of the plaintiff to the defendant's second plea.

JAMES F. GLEN,
*Attorney for Defendant.*

32 And thereafter, to-wit, on the 12th day of October, A. D. 1916, the said cause was submitted to the said Supreme Court of Florida upon briefs for the respective parties.

And thereafter, to-wit, on the 20th day of October, A. D. 1917, the said Supreme Court of Florida did render and file its opinion and judgment in the above styled cause, the said opinion and dissenting opinion filed therewith being in the words and figures following, to-wit:

33 In the Supreme Court of Florida, June Term, A. D. 1917, De Soto County.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

v.

KING LUMBER AND MANUFACTURING COMPANY, a Corporation, Defendant in Error.

*Statement.*

We copy the following statement from the brief of the plaintiff in error, which the defendant in error says in its brief is "a fair and correct statement of the pleadings which made up the issues in the case that was tried before the court below and which is now before this court for its consideration:"

"The King Lumber and Manufacturing Company, hereinafter referred to for the sake of convenience as the Manufacturing Company, sued the American Fire Insurance Company, hereinafter referred to as the Insurance Company, upon two policies of insurance. The policies as well as the proofs of loss submitted were made parts of the declaration, from which it appears that there were twelve separate items insured, of which loss is claimed only on account of items numbered Two, Five, Six, Eight, Eleven and Thirteen. It further appears that there was total concurrent insurance on the property to the amount of Forty-five Thousand, Seven Hundred and Fifty ($45,750.00) Dollars, and the policies contain the usual pro rata agreement in such cases.

"Item Five is a building the insurable value of which is fixed at Twenty-five Hundred ($2500.00) Dollars. Items Two, Six and Eight relate to machinery, tools, boilers, etc. Items Eleven
34 and Thirteen relate to manufactured product on hand.

"To the declaration the defendant filed two pleas as follows:

"'1. That at the time of the execution and delivery of the policies sued on, and each of them, and at the time the said policies went into force, the defendant was a corporation organized and existing under the laws of the State of Pennsylvania, and was not engaged in the transaction of business in the State of Florida, and had not secured a permit to do business in the State of Florida as a fire insurance company, and had no agent or representative in the State of Florida, and the said policies were made, executed and delivered in the State of Pennsylvania, and secured in the State of Pennsylvania by the plaintiff through the firm of Lowry and Prince of Tampa, Florida, as brokers of the plaintiff, and the defendant required to be inserted in and stamped on the face of the said policies a provision in the

following words, to-wit: "Warranted same gross rate, terms and conditions as and to follow the American Central Ins. Co., of St. Louis, Mo., and that said company has, throughout the whole time of this policy, at least $5,000 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void," and prior to the time of the alleged loss in the said declaration mentioned, but without the knowledge of the defendant, the said American Central Ins. Co., of St. Louis, Mo., had cancelled its policies on the property insured, and at the time of the loss alleged did not carry $5,000 or any other amount on the identical subject matter and risk, and prior to the institution of suit the defendant requested of the plaintiff the date of the cancellation by the said American Central Ins. Co., of St. Louis, Mo., of its insurance on the premises, and offered to refund the unearned portion of the premiums on the policies sued on from the date of such cancellation, but the plaintiff failed and refused to furnish or give to the defendant the date of such cancellation, and the defendant hereby tenders and offers to pay to the plaintiff the
35 amount of the unearned premiums from the date of such cancellation upon being advised of the date thereof, of which the defendant is now ignorant.'

"'2. And for a second and further plea the defendant says: that at the time of the execution and delivery of the policies sued on, and each of them, and at the time the said policies were expressed to go into force, and at the time of the plaintiff's loss, the entire property insured, including all of the personal property insured, was subject to and encumbered by the mortgage to W. G. Welles set forth in the plaintiff's proofs of loss, annexed to the said declaration, on which there was due a large sum of money, the existence of which mortgage was unknown to the defendant until the said proofs of loss were furnished it, whereby the said policies, according to the terms thereof, became null and void.'

"The plaintiff filed a demurrer to the second plea, which the court sustained, and replications to the first plea, to which the court sustained a demurrer. Plaintiff then filed the following amended replications:

"'First. That it denies that at the time the said policies went into force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, the defendant was transacting business within the State of Florida, and was in fact transacting business with the plaintiff. That on April 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of the property of the plaintiff, described in the policies sued on herein, and that the said policy of April 14, 1908, so written by the said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted with Lowry & Prince as to the nature of the risk assumed,
36 and from time to time, from April 14, 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the

physical condition of your repliant's property, and as to the advisability of assuming a risk thereon, and relied upon the said Lowry & Prince for its information on this subject. And repliant further shows that the said Lowry & Prince caused the defendant to write the said first policy of 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant.

"'Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no agent or representative in the State of Florida, but states the fact to be that Lowry & Prince who procured and caused said policies to be written, who collected the premiums and forwarded the same to the defendant, were the agents of the defendant.

"'Second. For a further replication to said first plea, repliant says that it is true that the two fire insurance policies sued on in this cause contained the warranty set out in said plea. Repliant states the fact to be that Lowry & Prince, the agents of the defendant as aforesaid, when they delivered the policies so sued on to repliant, called repliant's attention to said warranty clause, and stated to repliant that said clause would not affect repliant, and should be disregarded by repliant and gave as their reasons why said warrant clause should be disregarded, that the repliant had at that
37 time in the American Central Insurance Company of St. Louis, Mo., Six thousand five hundred ($6,500.00) dollars of insurance, covering the items insured by the policies of the defendant sued on herein.

"'Repliant further says that it at that time was carrying a large amount of insurance, approximately Forty-five Thousand ($45,000.00) Dollars in various companies, and that it did not keep up very closely with the amount of insurance that it had in any particular company, being careful only to keep the total amount approximately Forty-five Thousand Dollars; in reputable old line companies, and that it therefore relied upon the representation of the said Lowry & Prince, who stated that they had investigated the policies of repliant in the said American Central Insurance Company of St. Louis, Mo., and that repliant had Six Thousand Five Hundred Dollars of insurance, as aforesaid.

"'Repliant further says that relying upon the representation of said Lowry & Prince, agents of the said defendant, and relying upon their instructions to disregard said warranty, repliant accepted said policies, and paid the said Lowry & Prince the premium therefor, charged by the said defendant.

"'Third. Replying further to said first plea repliant says: That sometime prior to July 25, 1912, Lowry & Prince, as agents of the

defendant aforesaid, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #303149, in the sum of One Thousand Five Hundred ($1,500.00) Dollars and suggested to repliant that there be substituted for the last mentioned policy, a policy in a like sum in the People's National Fire Insurance Company of Philadelphia. This information coming from the said Lowry & Prince, the agents of the defendant, and this suggestion having been made by the agents of the defendant, repliant agreed to the cancellation of the said policy, and the substitution of a policy with the People's National Fire Insurance Company of Philadelphia.

" 'Repliant further says that sometime prior to October 27, 1912, the said Lowry & Prince, the agents as aforesaid of the said
38 defendant, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #303192, in the sum of One Thousand Five Hundred ($1,500.00) Dollars and the said Lowry & Prince suggested that there be substituted for the said last mentioned policy, a policy in a like amount in the American Union of Philadelphia. Said information and said suggestions being given by the agents of said defendant as aforesaid, repliant agreed that said last mentioned policy might be cancelled, and a policy in the American Union of Philadephia substituted therefor.

" 'Repliant further says that the said Lowry & Prince, agents of the defendant as aforesaid, assured repliant that the cancellation of the policies above mentioned was not a violation of the warranty set forth in said plea, provided a like amount of insurance was carried in some other old line insurance company.

" 'Repliant further says that as soon as said policies were cancelled, new policies were substituted in pursuance of said suggestion, in the companies above mentioned, and repliant therefore denies that said policies were cancelled without the knowledge of the defendant, but says that said policies were cancelled with the full knowledge and consent, and at the suggestion of Lowry & Prince, who were agents of said defendant as aforesaid, acting for it in the State of Florida, who, as such agents, had caused policies sued on to be issued, and who had collected the premiums paid by repliant for said policies sued on, and forwarded the same to the said defendant, and that said defendant thereby waived said warranty clause, ratified and confirmed the cancellation of said policies of insurance in the American Central Insurance Company of St. Louis.

" 'Fourth. Further replying to said first plea, repliant denies that said policies of insurance so sued on, were delivered in the State of Pennsylvania, but states the fact to be that same were delivered by Lowry & Prince, as agents for said defendant, to repliant, within the State of Florida, and accepted by repliant within said State.'

39 "Defendant thereupon filed a rejoinder as follows:

" 'That under the public laws of the State of Pennsylvania, which are entitled to full faith and credit in the State of Florida, the defendant is authorized to write and issue, in the State of Pennsylvania, policies of insurance on property outside the State of Pennsylvania, and in April, 1908, at Philadelphia, in the State of Pennsylvania, Lowry & Prince of Tampa, Florida, with whom the defendant

had no connection or relations, as brokers of the plaintiff, made application to the defendant requesting it to issue a policy insuring the property of the plaintiff situate in Florida, which the defendant did, and thereafter, from time to time, on the written requests of the said Lowry & Prince, addressed to the defendant at Philadelphia, in the State of Pennsylvania, the defendant continued to write and issue policies of insurance on the plaintiff's property, including those sued upon, but all of said policies were written and executed by the defendant in the State of Pennsylvania, and thereupon delivered and sent by mail to the said Lowry & Prince at Tampa, Florida, as brokers of the plaintiff, and each contained a similar warranty clause as to the existence of concurrent insurance on the property with an approved designated company doing business in the State of Florida, except that, from time to time, at the request of the said Lowry & Prince, the names of the companies were changed, as companies designated cancelled their risks on the property, and the name of the American Central Insurance Company of St. Louis, Missouri, was inserted in the contracts sued on at the special request of the said Lowry & Prince, stated by the said Lowry & Prince to the defendant to be made by them because they were agents for that company and would know of any cancellation by it, while some other company they did not represent might cancel without their knowledge; that the said Lowry & Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account, to waive any provisions in the contracts sued on, or to represent it in any manner, shape or form, but the plaintiff desired to secure, through them, insurance to the amount of $45,750.00, in accordance with a printed form prepared for the plaintiff by Lowry & Prince and annexed to the policies sued on, all of which they were unable to place with companies for which they were agents, and thereupon they transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission; and the defendant denies by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince for the defendant, any premiums on the policies of insurance, written by the defendant, and denies that Lowry & Prince were agents of the defendant, and denies that, prior to the furnishing of proofs of loss by the plaintiff, it had any notice or knowledge that the American Central Insurance Company of St. Louis, Missouri, had cancelled its policies on the property insured and did not carry $5,000 on the identical subject matter and risk, and denies that it advised or consul-ed with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject matter insured, and the companies carrying insurance thereon.'

"The court sustained a demurrer to the rejoinder and rendered final judgment thereon in favor of the plaintiff for the sum of Three Thousand, Two Hundred, Sixteen and 10/100 ($3,216.10) Dollars, from which this writ of error is prosecuted.

"The court in its judgment found that the provisions of Section 2765 of the General Statutes applied and made Lowry & Prince agents of the defendant, and that was the basis of its judgment.

"The assignment of errors is as follows:—

"'1st. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance
41 sued on, which were made in the State of Pennsylvania, denied full faith and credit to the laws of the State of Pennsylvania, in violation of Section 1 of Article IV of the Constitution of the United States.

"'2nd. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

"'3rd. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "nor shall any State deprive any person of life, liberty or property, without due process of law."

"'4th. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws."

"'5th. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, denied to the defendant the benefit of Article VI of the Constitution of the United States which provides that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the contrary notwithstanding."

"'6th. The court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the
42 said rejoinder was a complete answer to the plaintiff's replications.

"'7th. The court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the replications of the plaintiff were bad, and judgment should have been rendered against it on that ground.

"'8th. The court erred in holding that the plaintiff could secure reformation of the policies sued on in a Court of Law.

"'9th. The court erred in holding that Lowry & Prince had authority to abrogate the contracts represented by the policies sued on, and make new and different contracts with the plaintiff.

"'10th. The court erred in holding that the plaintiff could recover upon different causes of action from those set up in its declaration.

"'11th. The court erred in sustaining the demurrer of the plaintiff to the defendant's second plea.'"

43 This opinion by direction of the Court was prepared by Mr. Justice Shackleford, and approved by a majority of the Court, before his resignation. After that event it was again considered and readopted.

PER CURIAM:

We shall treat the first five assignments of error together, as they have been so discussed by the plaintiff in error, hereinafter referred to as the defendant, and the defendant in error, hereinafter referred to as the plaintiff, who concur in stating that all of such assignments "present questions arising under the Constitution of the United States." The first point which they present for our determination is whether the contracts declared upon, evidenced by the two policies of insurance, are Florida contracts, as contended by the plaintiff, or Pennsylvania contracts, as the defendant contends.

Section 2765 of the General Statutes of 1906, Compiled Laws of 1914, referred to in such assignments, reads as follows:

"Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed, to all intents and purposes, an agent or representative of such company, association, firm or individual."

This section originally formed Section 7 of Chapter 1863 of the Laws of Florida, (Acts of 1872, p. 12) was brought forward
44 as Section 2224 of the Revised Statutes of 1892, and was amended by Chapter 4380 of the Laws of Florida, (Acts of 1895, p. 147). We also think that it is advisable to copy Section 2777 of the General Statutes of 1906, Compiled Laws of 1914, which originally formed Section 3 of Chapter 4677 of the Laws of Florida, (Acts of 1899, p. 34), and is as follows:

"Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

We are not sure that we fully comprehend the argument made by the learned counsel for the defendant in support of these assignments, but, as we understand it, he does not attack the constitutionality of Section 2765 or contend that it is not operative within the State of Florida or controlling as to Florida contracts. These two quoted statutes, sections 2765 and 2777, make no discrimination between domestic and foreign insurance companies, as was attempted to be done by the statutes considered and discussed in State ex rel. Hoadley v. Board of Insurance Commissioners of Florida, 37 Fla.

564, 20 South. Rep. 772, 33 L. R. A. 288, but all insurance companies doing business within the State, whether incorporated or not, domestic or foreign, are placed upon the same footing and enjoy equal privileges and immunities. The defendant contends that the Circuit Court erroneously held that such section 2765 applied to the contracts of insurance sued on, which, it is averred, were made in the State of Pennsylvania. It is undoubtedly true, as is argued by the defendant and which the plaintiff admits, that a State may not extend the operation of its satutes beyond its borders into the jurisdiction of other States. As was said by Mr. Chief Justice White in New York Life Insurance Co. v. Head, 234 U. S. 149, text 161, Sup. Ct. Rep. ——, which language is quoted and relied upon by the defendant, in discussing "the power of the State of Missouri to extend its authority into the State of New York:" "Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause. It is illustrated as regards the right to freedom of contract by the ruling in Allgeyer v. Louisiana, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power."

Neither the Legislature nor the courts of Florida could extend the operation of its statutes beyond its borders, and this is likewise true of Pennsylvania. The Legislature of Florida would seem to have made no such attempt. The question which we are called upon to answer is did the Circuit Court attempt to extend the operation of these two statutes into the State of Pennsylvania? The answer to be given to this question depends upon whether the contracts of insurance must be held to be Florida or Pennsylvania contracts. Conceding the truthfulness of the averment in the first plea of the defendant that such defendant corporation, organized and existing under the laws of Pennsylvania, "had not secured a permit to do business in the State of Florida," in accordance with the statutory requirements, if, as a matter of fact, such defendant did voluntarily engage in the transaction of insurance business within the State of Florida, such defendant is as amenable to the provisions of Sections 2765 and 2777 as though it had been incorporated under the laws of Florida or had secured a permit to do business within such State as a fire insurance company.

See Sections 4 and 5 of Chapter 5717 of the Laws of Florida, (Acts of 1907, p. 231), Sections 2682*d* and 2682*e* of Compiled Laws of 1914, and Ulmer v. First National Bank of St. Petersburg, 61 Fla. 460, 55 South. Rep. 405, wherein the former section was quoted and discussed and which section was amended by Chapter 6876 of the Laws of Florida, (Acts of 1915, Vol. 1, p. 162.). It is true that such plea further avers that the defendant "had no agent or representative in the State of Florida and the said policies were made, executed and delivered in the State of Pennsylvania, and secured in the State of Pennsylvania by the plaintiff through the firm of Lowry & Prince of Tampa, Florida, as brokers of the plaintiff." In the amended replications to this plea the following allegations are contained:

"First. That it denies that at the time said policies went in force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, defendant was transacting business within the State of Florida, and was in fact transacting business with plaintiff.

"That on Apr. 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of the property of the plaintiff, described in the policies sued on herein, and that the said policy of Apr. 14, 1908, so written by said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted with the said Lowry & Prince as to the nature of the risk assumed, and from time to time, from Apr. 14,
47 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the physical condition of your repliant's property, and as to the advisability of assuming a risk thereon and relied upon the said Lowry & Prince for its information on this subject.

"And repliant further shows that the said Lowry & Prince caused the defendant to write the said policy of 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant.

"Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no Agent or representative in the State of Florida, but states the fact to be that Lowry & Prince, who procured and caused said policies to be written

who collected the premiums and forwarded the same to the defendant, were the agents of the defendant."

In its rejoinder to the amended replications, which rejoinder and amended replications are copied in full in the prefatory statement to this opinion, the defendant admits the issuance of a policy by it on the property of the plaintiff situate in Florida in April, 1908, and that "the defendant continued to write and issue policies of insurance on the plaintiff's properties, including those sued upon," upon the written request of Lowry & Prince, as brokers of the plaintiff, but avers that "with whom the defendant had no connection or relations." The rejoinder further avers that Lowry &
48 Prince "transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission." The defendant then proceeds to add the following denial: "and the defendant denies that by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince, for the defendant any premiums on the policies of insurance, written by the defendant, and denies that Lowry & Prince were agents of the defendant." and concludes its rejoinder as follows: "And denies that it advised or consulted with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject-matter insured, and the Companies carrying insurance thereon."

We deem it proper to call attention to the fact that the defendant begins its rejoinder with the statement, upon which it strongly relies, "That under the public laws of the State of Pennsylvania, which are entitled to full faith and credit in the State of Florida, the defendant is authorized to write and issue, in the State of Pennsylvania, policies of insurance on property outside the State of Pennsylvania."

The rejoinder was filed to all of the amended replications and the demurrer interposed by the plaintiff was addressed to the entire rejoinder, which demurrer was sustained as an entirety. See Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 South. Rep. 687, and authorities there cited. For a proper understanding of these pleadings reference should be had to them in the prefatory statement. We have given extracts from them here merely as a matter of convenience and to render this opinion the more readily intelligible.

We have repeatedly held that every pleading is to be most strictly construed against the pleader thereof, that it is the first essential of good pleading that it be characterized by certainty, which
49 quality is especially requisite in replications and rejoinders. See Hillsborough Grocery Co. v. Leman, 62 Fla. 208, 56 South. Rep. 684, wherein we discussed what should characterize a rejoinder which admits the correctness of certain statements in the replication but seeks to avoid the same. We have also held that, where a pleading has on its face two intendments, it must be con-

strued most strictly against the party who pleads it. Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 South. Rep. 761. We have also held, where there are inconsistent or contradictory allegations or averments in a pleading, that such pleading would be tested by the weaker, rather than by the stronger, allegations or averments. We have likewise held that, where there are contradictory, repugnant or inconsistent statements in a pleading, such statements would have the effect of neutralizing each other and that such pleading would be held bad on demurrer. See Hoopes Bros. v. Crane, 56 Fla. 395, 47 South. Rep. 992, and State v. Seaboard Air Line Ry., 56 Fla. 670, 47 South. Rep. 986. We have further held that a demurrer interposed to a pleading admits the truth of all such matters of fact as are well and sufficiently pleaded, but allegations or averments of mere conclusions of law are not admitted by a demurrer, for the law is to be ascertained by the court. Brown v. Avery, 63 Fla. 355, 58 South. Rep. 34, Ann. Cas. 1914A 90.

Although Lowry & Prince were acting as brokers for the plaintiff in procuring insurance upon its property, it might also be true that, by virtue of what was actually done by them and the defendant in such transaction the law would also hold them to be the agents of the defendant. That Lowry & Prince could act in the dual capacity of insurance brokers for the plaintiff in procuring insurance upon its property and also as agents for the defendant insurance company there can be no question. See Hooper v. State of California, 155 U. S. 648, 15 Sup. Ct. Rep. 207, in which the opinion was rendered by Mr. Justice White. and from which we take the following excerpt: "The admission that the insurance was procured for the resident from a foreign company, which had no agent in the State, does not exclude the possibility of its having been procured within the State. If it were obtained for the resident
50 by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute.

"The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring—to bring about 'the meeting of their minds,' which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent. How v. Union Mut. Life Ins. Co., 80 N. Y. 32; Monitor Mut. Ins. Co. v. Young, 111 Mass., 537; Hartford Ins. Co. v. Reynolds, 36 Michigan, 502

"Domat thus defines his functions: 'The engagement of a broker is like to that of a proxy, a factor, or other agent; but, with this difference, that the broker, being employed by persons who having opposite interests to manage, he is, as it were, agent both for the one and the other to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them entrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally.' 1 Domat, bk. 1, tit. 17, Sec. 1, Strahan's trans.

"Story says this statement of the functions of a broker is 'a full

and exact description according to the sense of our law.' Story's Agency, 31, note 3, 9th ed.

"If the contention of the plaintiff in error were admitted the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend
51 not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable.

"The facts found here enforce the correctness of these views, and illustrate the evil which the statute was doubtless intended to prevent.

"Johnson & Higgins were average adjusters and brokers in New York City. Hooper, the plaintiff, as their agent, had a place of business in San Francisco. As such broker he applied for the insurance to his principals in New York City; the policy came to San Francisco for delivery, and the premium was there paid."

Also see John R. Davis Lumber Co. v. Hartford Fire Insurance Co., 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131, wherein it was held as follows: "Although sec. 1977, R. S., declares that whoever solicits or procures insurance from an insurance company on behalf of another, or makes any contract for insurance, or collects any premium, etc., shall be held to be an agent of such insurance company 'to all intents and purposes,' it cannot be construed to prevent an insurance broker employed to procure insurance for another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies, that the principal is bound by the acts and representations of the agent within the scope of his authority. Where the two relations conflict, the statute must prevail."

We call especial attention to the similarity of the Wisconsin statute, quoted in the opinion rendered by Mr. Justice Marshall in the cited case, to our own statute, Section 2765 of the General Statutes of 1906, which we have copied above. Also see Shomer v. Hekla Fire Insurance Co., 50 Wis. 575, 7 N. W. Rep. 544, wherein was discussed the origin, history and object of the Wisconsin statute, which
52 is cited and quoted from with approval in John R. Davis Lumber Co. v. Hartford Fire Insurance Co., supra. We find from the strong opinion rendered by Mr. Chief Justice Cole in Schomer v. Hekla Fire Insurance Co., supra, wherein the Wisconsin statute would seem to have been construed for the first time, that Section 1977 of the Revised Statutes of Wisconsin, therein being considered, was a combination or union of several statutes, which are given. As was said in the opinion: "It seems to be designed in the clearest manner to make the company responsible to the public for the acts of one whom it permits to solicit insurance on its behalf, or who receives applications for insurance, makes, or aids in making, contracts

of insurance, or transacts the business, whether such person has in fact authority to act for it or not. The law imposes upon the company the duty of seeing to it that none but its regular authorized agents shall do its business or deal with the public. It is certainly not difficult for an insurance company to say to its local agents that they alone must transact its business; that they must in all cases deal directly with the insured in making insurance contracts, and not allow the interference of any stranger in its business, for whose acts it does not wish to be held responsible. That this is the plain object and intent of the statute we have no doubt. And, where the insurance company issues a policy in a case where a person has assumed the right to act for and represent it in making the contract, it must abide by the consequences and meet the liability which the statute imposes upon it." As had been previously stated therein: "Now it is difficult to imagine what object this provision was intended to accomplish, or what purpose subserve, if it has not the effect, under the circumstances, to make Lawson the agent of the defendant in the transaction. His acts, certainly, bring him within both the letter and spirit of the law. He was the only real actor for the defendant in making the contract; pro hac vice he assumed to represent, and did represent, the company in the matter; he received the application, settled with the insured the rate and terms of insur-
53 ance, delivered to them the policy, collected the premiums, and shared in the commission. In fact, he did everything that was done on behalf of the company, except the mere act of countersigning the policy. He was the only person the plaintiffs dealt with; they knew no other agent in effecting the insurance; they were totally ignorant of his relation to the defendant, or of his want of authority to represent and act for it. It is idle to contend that he did not in any manner aid or assist in making the contract for the company, when he was, in fact, the only person who did treat with the plaintiffs on its behalf."

We would also refer to State v. United States Mutual Accident Association, 67 Wis. 624, 31 N. W. Rep. 229; Stanhilber v. Mutual Mill Insurance Co., 76 Wis. 285, 45 N. W. Rep. 221; Stehlock v. Milwaukee Mechanics' Insurance Co., 87 Wis. 322, 58 N. W. Rep. 379; Rose v. Kimberly & Clark Co., 89 Wis. 545, 62 N. W. Rep. 526, 27 L. R. A. 556; Wicks Bros. v. Scottish Union & National Insurance Co., 107 Wis. 606, 83 N. W. Rep. 781; Wisconsin Central R. Co. v. Phœnix Insurance Co., 123 Wis. 313, 101 N. W. Rep. 703; Welch v. Fire Association of Philadelphia, 120 Wis. 456, 98 N. W. Rep. 227; Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 105 N. W. Rep. 801.

In Queen Insurance Co. v. Patterson Drug Co., 73 Fla., —, 74 South. Rep. 807, we had occasion to quote and discuss to some extent Sections 2765 and 2777 of the General Statutes of 1906, though we were not there dealing with the precise questions which confront us in the instant case. We copied therein the Texas statute and pointed out that it was of similar effect to our statute. We also quoted with approval an excerpt from the opinion rendered in German Insurance Co. v. Everett, — Tex. Civ. App., — 36 S. W. Rep. 125, to which we would again refer. Also see German Insurance

Co. v. Everett, 18 Tex. Civ. App. 514, 14 S. W. Rep. 95. The following cases will also be found instructive upon the points which we are now considering: Fred Miller Brewing Co. v. Council Bluffs Insurance Co., 95 Iowa 31, 63 N. W. Rep. 565; St. Paul
54 Fire & Marine Insurance Co. v. Sharer, 76 Iowa, 282, 41 N. W. Rep. 19; Continental Insurance Co. v. Ruckman, 127 Ill., 364, 20 N. E. Rep. 77, 11 Am. St. Rep. 121; Pierce v. People, 106 Ill., 11, 46 Am. Rep. 683; Phœnix Insurance Co. v. Levy, (Tex. Civ. App.) 33 S. W. Rep. 992; Pollock v. German Fire Insurance Co., 127 Mich. 460, 86 N. W. Rep. 1017; New York Life Insurance Co. v. Russell, 77 Fed. Rep. 94, 23 C. C. A. 43; Bank of Brunson v. Aetna Insurance Co., 203 Fed. Rep. 810; Continental Life Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. Rep. 87; Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281; New York Life Insurance Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. Rep. 962. Also see note on page 124 of 107 Amer. St. Rep.

We have examined all of the authorities which have been cited to us, as well as others, devoting especial attention to those cited by the defendant. The cases bearing upon the questions which we are now considering are so numerous and the results announced by the different courts are so varied that we cannot undertake to cite or discuss them all. It must be conceded that the authorities are more or less conflicting and that it would be impossible to reconcile or harmonize them. This is due somewhat, but not entirely, to different statutes and variant facts and circumstances. All that we attempt to do is to select from the great mass such authorities as seem to us to bear most directly upon the precise points involved in the instant case and to contain what we conceive to be correct statements of the principles of law which should control. The defendant strongly relies upon Allgever v. State of Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427; Old Wayne Mutual Life Insurance Co., v. McDonough, 204 U. S. 8, 27 Sup. Ct. Rep. 236, reversing the judgment rendered by the Supreme Court of Indiana in 164 Ind. 321, 73 N. E. Rep. 703; New York Life Insurance Co. v. Head, 234 U. S. 149, 34 Sup. Ct. Rep. 879 Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. Rep. 255. The defendant states that nearly all of the cases cited and relied upon by the plaintiff, some of which we have cited above, were decided prior to Allgeyer
55 v. Louisiana, supra, which was decided in March, 1897, and, therefore, "are necessarily overruled by that decision, so far as there is any conflict, and also by Old Wayne Mutual Life Insurance Co., supra, so far as they encounter it." Some of the cases which we have cited above were decided prior to Allgeyer v. Louisiana, supra, and some subsequently thereto, but that fact would not seem to be of as much moment as the defendant contends. We would point out as instances that Wicks Bros. v. Scottish Union & National Insurance Co., supra; Welch v. Fire Association of Philadelphia, supra; Wisconsin Central Ry. Co. v. Phœnix Insurance Co., supra; Presbyterian Ministers' Fund v. Thomas, supra, were all decided by the Wisconsin court subsequent to the decision ren-

dered in Allgeyer v. Louisiana, supra, and, as the prior decisions of the Wisconsin court, which we have cited above, were cited and approved in these subsequent decisions, evidently that court did not consider that such prior decisions had been overruled by Allgeyer v. Louisiana supra. We would refer especially to Welch Bros. v. Fire Association of Philadelphia, supra, in which the opinion was written by Mr. Justice Marshall, who also wrote the opinion in John R. Davis Lumber Co. v. Hartford Fire Insurance Co., which we have commended above, and in which both the opinions rendered in John R. Davis Lumber Co. v. Hartford Fire Insurance Co., supra, and Schomer v. Hekla Fire Insurance Co., supra, are cited and approved. It is true that no Federal questions were discussed or Federal cases cited therein. The defendant also points out that, although the case of Swing v. Munson, 191 Pa. 582, 43 Atl. Rep. 342, 58 L. R. A. 223, cited by the plaintiff, would seem to sustain its contention, the same plaintiff, Swing, "sued other parties in other States with the opposite result," and cites Swing v. Hill, 165 Ind. 411, 75 N. E. Rep. 658, and Swing v. B. E. Brister Co., 87 Miss. 516, 40 South. Rep. 146, and also cites Stone v. Old Colony St. Ry. Co., 212 Mass. 459, 99 N. E. Rep. 218.

We cannot go into any extended discussion or analysis of
36 all these cases. In the case of Allgeyer v. Louisiana, supra, the statute of Louisiana presented for construction, the nature of the action, the pleadings, facts and circumstances all differ so widely from those in the instant case that the principles announced in the opinion rendered in the cited case would seem to have but little applicability to the instant case. This is likewise true of the other decisions of the United States Supreme Court cited by the defendant. As was said in Allgeyer v. Louisiana, supra, text, page 590: "Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper case (supra), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or

other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

It will be observed on reading the opinion that the court
57 was careful to differentiate that case from Hooper v. California, 155 U. S. 648, 15 Sup. Ct. Rep. 207, from which we have already quoted above. We would also call attention to the following holding in Allgeyer v. Louisiana, supra: "Hooper v. California, 155 U. S. 648, distinguished from this case; and it is further held that, by the decision in this case it is not intended to throw any doubt upon, or in the least to shake the authority of that case.

"When or how far the police power of the State may be legitimately exercised with regard to such subjects must be left for determination in each case as it arises."

We think that Hooper v. California, supra, is far more nearly in point to the instant case than the other Federal cases cited and relied upon by the defendant. We shall not stop to comment upon Swing v. Brewster, 87 Miss. 516, 40 South. Rep. 146; Swing v. Hill, 165 Ind. 411, 75 N. E. Rep. 658; Stone v. Old Colony St. Ry. Co., 212 Mass. 459, 99 N. E. Rep. 218, also cited and relied upon by the defendant, in all of which Allgeyer v. Louisiana, supra, is cited. We content ourselves with stating that we have carefully read the same and do not find they throw much light upon the points which we are now considering. We prefer to rest the conclusion which we have reached upon the principles announced in Hooper v. California, supra, and the Wisconsin and other cases which we have cited above.

As we read the pleadings in the instant case and the respective orders made thereon, which form the basis for the assignments now under consideration, we fail to find where any such orders had the effect of giving extra-territorial effect to either section 2765 or 2777 of the General Statutes of 1906, or extending their operation into the State of Pennsylvania, as the defendant contends. The pleadings show that the property upon which the two policies were issued was situated in Florida and that such policies were delivered to the plaintiff in Florida by Lowry & Prince, who were not only acting as insurance brokers for the plaintiff in the transaction, but also
as agents for the defendant. In other words, we are of the
58 opinion, and so hold, that the two policies of insurance were and are Florida contracts and that by reason of the transactions had by the defendant with Lowry & Prince and what was done by and through them, the defendant paying them "the usual broker's commission" for effecting such insurance, the defendant was doing business in Florida, and that Lowry & Prince were the defendant's agents, within the provisions of Section- 2765 and 2777, as was held by the Circuit Court. This conclusion is confirmed we think by the admission in the concluding paragraph of the rejoinder wherein it is alleged that the defendant "did request information from them (meaning Lowry & Prince), as to the subject-matter insured," because it is a matter of common knowledge that fire in-

surance companies, before accepting applications for insurance, have such inspections made as are necessary to inform themselves of the character and condition of the property to be covered by the insurance applied for and when the defendant "did request information" from Lowry & Prince, "as to the subject-matter insured" it constituted them its agents for the purpose of obtaining information that would influence its attitude and action in reference to the subject about which it sought information, and it cannot now be heard to deny this relationship and thereby escape the consequent liability. As we view it, the laws of the State of Pennsylvania had nothing to do with the transaction, were not applicable or controlling and were not before the Circuit Court for consideration. We are further of the opinion that, if Lowry & Prince were such statutory agents of the defendant, they must be held to be agents or representatives of the defendant "to all intents and purposes," as Section 2765 expressly provides, that is general, and not special, agents. It is true that in Mutual Life Insurance Co. v. Hilton-Green 241 U. S. 613, — Sup. Ct. Rep., — which is cited to us by the defendant, it was held: "While Sec. 2765, Florida Statutes, undertakes to designate as agents of insurance companies certain persons in fact, acting for such companies in some particulars, it does not fix the
59 scope of their authority as between the company and third persons, and does not raise special agents with limited authority into general ones with unlimited power." We have carefully read the opinion rendered in this case, as well as the two opinions rendered in the same case by the Circuit Court of Appeals for the Fifth Circuit, reported in 202 Fed. Rep. 113, and 211 Fed. Rep. 31, but shall not undertake to analyze or discuss them. For a proper understanding of the opinion rendered by the United States Supreme Court it is necessary to have in mind all the facts and circumstances as they were developed in that case. Suffice it to say that they are very different from those in the instant case. Here no rights of third persons are involved and we are not called upon to fix the scope of the authority, "as between the company and third persons," which would seem to have been a controlling feature in the cited case. Be that as it may the duty devolves upon us to construe our own statutes. As was said in Osborne v. State of Florida, 164 U. S. 650, text 654, 17 Sup. Ct. Rep. 214, "The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own State. Leffingwell v. Warren, 2 Black, 599; People v. Weaver, 100 U. S. 539, 541; Noble v. Mitchell, 164 U. S. 367, 372, and cases there cited."

We would call especial attention to Noble v. Mitchell 164 U. S. 367, 17 Sup. Ct. Rep. 110 referred to above for the reason that in that case, as is stated therein, the Supreme Court of Alabama was called upon to construe certain statutes regulating the transaction of business by insurance companies within that State which were quite similar to our statutes which we are now considering and, as was stated in the opinion in the cited case, which was rendered by Mr.

Justice White: "The highest court of the State having affirmed the validity of the state statute and enforced its provisions against the plaintiff in error, despite his objection duly made that such statute was repugnant to the Constitution of the United
60 States, a writ of error was allowed, and the cause is here for review." The opinion then proceeds to quote the following language from Hooper v. California, 155 U. S. 648, text 655, from which we gave certain excerpts above: "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

After quoting this language from his former opinion, Mr. Justice White goes on to say: "It inevitably results from this ruling that the State of Alabama, in virtue of the power possessed by it of excluding foreign fire insurance corporations from its jurisdiction, could lawfully punish or regulate, by the imposition of civil liability, or otherwise, the doing of acts within the territory of the State calculated to neutralize and make ineffective the statute which prescribed conditions upon which alone the right existed in a foreign insurance corporation to do business within the State." For the opinion rendered by the Alabama Supreme Court see 100 Ala. 519, 14 South. Rep. 581, 25 L. R. A. 238.

61 As we have already said by our two statutes which we are considering, all insurance companies doing business within the State, whether incorporated or not, domestic or foreign, are placed upon the same footing and enjoy equal privileges and immunities. This being true, the courts should not make a discrimination in favor of a foreign insurance corporation which is attempting to do business in Florida without complying with the statutory requirements. We would refer again to Queen Insurance Co. v. Patterson Drug Co., 73 Fla. —, 74 South. Rep. 807, and call attention to what we have so recently said both on the subject of agents of insurance companies under our statutes and of the waiver by such agents of provisions in insurance policies. Also see the authorities there cited, especially Tillis v. Liverpool, L. & G. Insurance Co., 46 Fla. 268, 35

South. Rep. 171, 110 Am. St. Rep. 89, and Eagle Fire Co v. Lewallen, 56 Fla. 246, 47 South. Rep. 947. Still other decisions of this court, as well as of courts of other jurisdictions, will be found cited in these opinions We would also refer to Aetna Insurance Co. v. Holmes, 59 Fla. 116, 52 South. Rep. 801; Hartford Fire Ins. Co. v. Brown, 60 Fla. 83, 53 South. Rep. 838; Southern States Fire Ins. Co. v. Vann, 69 Fla. 549, 68 South. Rep. 647, L. R. A. 1916B 1189; Palatine Insurance Co. v. Whitfield, 73 Fla. —, 74 South Rep. 869. We would also refer again to Schomer v. Hekla Fire Ins. Co., 50 Wis. 575, 7 N. W. Rep. 544, especially the extract therefrom which we copied above. Reading the replications and the rejoinder thereto, which are copied in the prefatory statement, in the light of the authorities which we have cited, we are of the opinion not only that Lowry & Prince, under our statutes, were the agents of the defendant, but that the warranty clause therein as to the existence of concurrent insurance on the property, must be held to have been waived by the defendant by reason of the statements and acts of Lowry & Prince, its agents. It necessarily follows from what we have said that we are of the opinion that the first five assignments, presenting questions arising under the Constitution of the United States, have not been sustained.

62 We next take up the sixth and seventh assignments which are argued together by the counsel for the defendant, being predicated upon the sustaining of the plaintiff's demurrer to the defendant's rejoinder, as stated in the brief of the defendant's counsel, "the former being grounded on the fact that it was a good answer to the replications, the latter on the fact that the replications were bad." In treating the first five assignments we have already held in effect that we were of the opinion that the rejoinder, which was filed to all the amended replications, was not a good answer to the same, and we might well content ourselves with what we have there said. As is said by the counsel for the defendant in his brief, "It is obvious that this rejoinder was a complete answer to the replications unless as a matter of law Lowry & Prince were agents of the defendant, and even if they were defendant's agents it was still good unless their agency extended continuously for every purpose, after the delivery of the policies, even to the extent of making new contracts." We have squarely held that as a matter of law Lowry & Prince were the agents of the defendant "to all intents and purposes," as the statute expressly provides, and that the acts of such agents in connection with the cancellation of the warranty provision stamped upon the policies as to the existence of concurrent insurance upon the property and the statements made by such agents to the plaintiff were within the scope of the real or apparent authority of such agents, and, therefore, were binding upon their principal, the defendant. As we held in Eagle Fire Insurance Co. v. Lewallen, 56 Fla. 246, 47 South. Rep. 947, which principle we had announced in prior and have followed in subsequent opinions: "The acts of an agent performed within the scope of his real or apparent authority are binding upon his principal. The public have a right to rely upon an agent's apparent authority and are not bound to enquire as to his special powers, unless the circumstances are such as to put them upon inquiry." Also see Tillis v. London & Liverpool & Globe

Insurance Co., 46 Fla. 268, 35 South. Rep. 171, 110 Am. St. Rep. 89; Hartford Fire Insurance Co. v. Redding, 47 Fla. 228,
63 37 South Rep. 62, 67 L. R. A. 518, 110 Am. St. Rep. 118; Southern States Fire Insurance Co. v. Vann, 69 Fla. 549, 68 South Rep. 647, L. R. A. 1916B 1189; Beekman v. Sontag Investment Co., 67 Fla. 293, 64 South. Rep. 948. The counsel of the defendant in his brief virtually concedes that, under our holding in Eagle Fire Insurance Co. v. Lewallen, supra, an insurance agent, acting within the scope of his real or apparent authority, would have the power or authority to waive a provision in the policy which was a condition subsequent, but earnestly contends that the warranty clause endorsed upon the policies declared on was not a condition subsequent, but a condition precedent, which could not be waived by Lowry & Prince. For convenient reference we copy here such warranty clause, stamped upon each of the policies, as the rejoinder states, by the defendant, "at the special request of the said Lowry & Prince," which clause is as follows: "Warranted same gross rate terms and conditions as and to follow the American Central Ins. Co. of St. Louis, Mo. and that said Company has, throughout the whole time of this policy at least $5,000 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void."

We do not construe this clause as a condition precedent. Under our holding in Tillis v. Liverpool & London & Globe Co., supra, it would seem to be in the nature of a condition subsequent. Also see 2 Cooley's Briefs on the Law of Insurance, 1480, and authorities there cited. Strictly speaking, such warranty clause may be neither a condition precedent or condition subsequent. See 2 Cooley's Briefs on the Law of Insurance, 1121, and authorities there cited, especially Redman v. Aetna Insurance Co., 49 Wis. 431, 4 N. W. Rep. 591. We shall not pause to discuss this point, as it is a matter of no especial moment, so far as the proper disposition of the instant case is concerned. See 19 Cyc. 777, where the law would seem to be correctly stated as follows: "When an insurance contract is conditioned to become void in case there be a breach of a condition precedent or subsequent, the true meaning is not that the instrument is upon
64 a breach thenceforth a nullity and has no legal existence, but only that upon the violation of the covenants by the insured the insurer shall cease to be bound by his covenants. Inasmuch therefore as such conditions are inserted for the benefit of the insurer they may all be waived by him, except when the insured by the act loses his insurable interest. Even a stipulation that the conditions of a policy cannot be waived, or if waived at all only in a certain manner, may itself be waived." Also see the authorities from the different jurisdictions cited in the notes to support the text. The following later authorities will also be found instructive: Black v. Grain Shippers Mutual Fire Insurance Association, 171 Iowa 309, 152 N. W. Rep. 7; Liquid Carbonic Acid Manufacturing Co. v. Phœnix Insurance Co., 126 Iowa 225, 101 N. W. Rep. 749; Plunkett v. Piedmont Mutual Insurance Co., 80 S. C. 407, 61 S. E. Rep. 893; Gold Issue Mining & Milling Co. v. Pennsylvania Fire Insurance Co., 267 Mo. 524, 184 S. W. Rep. 999. As to the further contention of the defendant that the replications set out a different contract from

those alleged in the declaration we cannot agree. We do not consider the replications as making what is known as a departure in pleading, therefore there is no occasion for us to discuss that doctrine. As to what constitutes a departure in pleading see Tillis v. London & Liverpool & Globe Insurance Co., supra, and Eagle Fire Insurance Co. v. Lewallen, supra.

The defendant further contends in support of these assignments that the replications were bad, therefore the demurrer to the rejoinder reaches back to them and should have been overruled. Undoubtedly it is true, as we have frequently held, that "In an action at law wherein a demurrer is interposed to replications to a plea, all previous pleadings are thereby opened up, and judgment should be rendered thereon against the party who committed the first serious error, and if the plea should be held to be bad, judgment on the demurrer is properly rendered against the defendant." Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 South. Rep. 761. Also see 18 Ency. of Pl. & Pr. 86. We have held that, under Section 1451 of
65 the General Statutes of 1906, a plaintiff "may file as many replications or subsequent pleadings to any pleading of the defendant as he may desire," though we have said that the advisability of filing a number of replications was questionable. See Southern Home Insurance Co. v. Putnal, 57 Fla. 199, 49 South. Rep. 922, and Hartford Fire Insurance Co. v. Redding, supra. It will be observed that the defendant did not interpose a demurrer to the amended replications either jointly, severally, or jointly and severally, or file a motion to strike out or for compulsory reformation, as it might have done, if it conceived that such replications, or any of them, were insufficient or faulty in any respect. Instead of so doing, the defendant filed a rejoinder to all of such replications. If the demurrer interposed to the rejoinder be carried back to the replications, it must be considered as addressed to all of the replications as an entirety. It would necessarily follow that if any one of the replications is a good answer to the first plea, the judgment was properly rendered for the plaintiff on the demurrer to the rejoinder. See the discussion and the authorities cited in Southern Home Insurance Co. v. Putnal, supra. It is unquestionably true, as we have already said, that the quality of certainty is especially requisite in replications and rejoinders. It is further true that, if there are several pleas, and the replication undertakes to answer one of such pleas, it must answer the whole of the plea which it professes to answer. 18 Ency. of Pl. & Pr. 655. But, as is said on page 656 of the work just cited, "The pleader may, however, reply to any one of several material allegations of the plea where each of such allegations is essential to its support, because the demolition of any one of them will effectually destroy the whole defense." Also see 31 Cyc. 250; Andrews' Stephens Pleading, section 138; Lawson v. State, 9 Ark. (4 Eng.) 9; Smith v. Olliphant, 2 Sandf. (N. Y.) 306. Also see our holding in New York Life Insurance Co. v. Mills, 51 Fla. 256, 41 South. Rep. 603. We call attention to the fact that, while the different amended replications, if they be properly designated replications, instead of forming but a
66 single replication, divided into numbered paragraphs for convenience, as would seem to be the case, are addressed to the first plea, in reality they go to separate portions of such plea. It is

also obvious that such plea has several material and distinct averments. Whether considered as several replications directed to different or distinct material averments in the plea, or as one replication, separated into paragraphs, as said above, addressed to the plea as an entirety, we do not consider such replications or replication demurrable. In other words, we think that the replication, as we prefer to call it, constitutes a good answer to the first plea. Entertaining these views, we must hold that the sixth and seventh assignments have not been sustained.

We now reach the eighth and tenth assignments, which are argued together, the defendant's counsel stating in his brief: "The former alleges error in holding that plaintiff could secure reformation of the policies in an action at law, and the latter in permitting the plaintiff to recover judgment on different causes of action from those set forth in its declaration."

In discussing the preceding assignments, we have already held adversely to this contention of the defendant, so there is no occasion to say more here. We do not understand the order of the Circuit Court as holding that the plaintiff could secure reformation of the policies in an action at law. We have also said that we did not consider that the replications constituted a departure in pleading.

The ninth assignment is that "The Court erred in holding that Lowry & Prince had authority to abrogate the contracts represented by the policies sued on, and make new and different contracts with the plaintiff."

We have already discussed this assignment and expressed our views of the holding in Mutual Life Insurance Co. v. Hilton-Green, 241 U. S. 613, — Sup. Ct. Rep. —, the only authority cited in support of such assignment. It must be held to have failed.

The only remaining assignment is the eleventh, which is as
67 follows: "The Court erred in sustaining the demurrer of the plaintiff to the defendant's second plea." The second plea is copied in full in the prefatory statement. It was filed to the declaration as constituting a full and complete defense to the action upon the two policies. The declaration, as well as the attached policies, shows that the insurance was upon both real and personal property. The defendant rightly says that the policies may be divisible and cites Hartford Fire Insurance Co. v. Hollis, 64 Fla. 89, 59 South. Rep. 785. The only other authorities cited by the defendant in support of this assignment are Georgia Home Insurance Co. v. Hopkins, 71 Fla. 282, 71 South. Rep. 285, and Section 1437 of the General Statutes of 1906, Compiled Laws of 1914, which is as follows: "All pleadings capable of being taken distributively shall be so taken." We do not see wherein these authorities avail the defendant in support of this assignment, therefore we must hold that it has not been sustained.

The judgment will be affirmed.

Browne, C. J., and Whitfield and West, JJ., concur.

Taylor and Ellis, JJ., dissent.

68 ELLIS, *J.*, dissenting:

I am unable to agree with the conclusion arrived at by the court in this case.

The defendant's first plea contained substantially the same averments of ultimate facts as its rejoinder, viz: The policies of insurance sued on were Pennsylvania contracts; that Lowry & Prince were not the defendant's agents, but were agents for the plaintiff only. The plea then avers that each policy contained a certain warranty which the plaintiff had violated. The replication of the plaintiff which considered in its entirety was a mere traverse of the averments of the plea as to the contract being a Pennsylvania contract and that Lowry and Prince were agents only of the plaintiff alleged the contracts to be Florida contracts and a waiver of the warranty by defendant through Lowry and Prince who were alleged to be the defendant's agents. Now the rejoinder merely took issue upon the allegations of the replication as to the contracts being Florida contracts and that Lowry and Prince were defendant's agents and that the warranty had been waived, by averring that the contracts were made in Pennsylvania, that Lowry and Prince were not their agents and that the defendant had not waived the warranty.

If this rejoinder was true it constituted a perfect defense, because neither Section 2765 nor 2777 of the General Statutes of Florida, 1906, Florida Compiled Laws, 1914, can have any force or effect beyond the limits of the State of Florida by imposing upon the defendant and Lowry and Prince the relation of principal and agent in invitum. That a State cannot extend the operation of its statutes beyond its borders into the jurisdiction of another State is conceded to be true in the majority opinion, which contains excerpts from the opinion of Mr. Chief Justice White of the Supreme Court of
69 the United States in the case of New York Life Insurance Co. v. Head, 234 U. S. 149, Sup. Ct. Rep., upon that point. Therefore if Sections 2765 and 2777 of the General Statutes are to be applied in this case the defendant insurance company must be either a corporation of this State or actually doing business in this State through its officers or agents, or that the contracts sued on were made or executed in this State. This is true because the object upon which the statute acts, whether it be persons or things, must be within the State's jurisdiction. As Mr. Chief Justice White said in the case referred to, there is a difference which in the nature of things must obtain "between questions concerning the operation and effect of a State law within its borders and upon the conduct of persons confessedly within its jurisdiction; and its right to extend its authority beyond its borders so as to control contracts made between citizens of other States and virtually in fact to disregard the law of such other States by which the acts done were admittedly valid." That is the distinction which was drawn in the case of Hooper v. State of California, 155 U. S. 648, 15 Sup. Ct. Rep. 207, by the then Mr. Justice White. A statute of California punished "every person who in this State procures or agrees to procure for a resident of this State any insurance" from a corporation not of that

State unless it had filed the bond required by the statute relative to insurance. Hooper was the agent of certain insurance brokers in New York City. Mott a resident of California, inquired of Hooper if he could procure a certain amount of insurance on a vessel named the "Alliance" at a given rate of premium, no particular company being specified by Mott. Hooper communicated with his principals in New York, who placed the insurance in a Boston Company and advised Hooper. The policy was forwarded by the New York brokers to Hooper, who delivered it to Mott, the latter paying the former the premium as the agent of the New York brokers. Hooper was arrested and charged with the misdemeanor denounced by the statute. It was contended by him that the statute was illegal because it undertook to forbid the procurement of a contract outside
70 of the State, and the evidence showed that the contract in fact was entered into without the territory of California. Judge White said that the admission that the insurance was procured for the resident from a foreign company which had no agent in the State did not exclude the possibility of its having been procured within the State. "If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute." Hooper was an insurance broker; he was the representative of other insurance brokers who were in New York, and to the extent of procuring the insurance was the representative of the insurance company, so that it might be said that he procured the insurance in California, for a resident of that State. The statute however dealt with and operated upon the conduct of Hooper, a resident of and whose act was confessedly committed in the State of California. This view however was not concurred in by Justices Harlan, Brewer and Jackson, who thought that the application of the statute to the case was an illegal interference with the liberty both of Mott and Hooper as well as an abridgement of the privilege of the firm of New York brokers through whom the policy was obtained, and the fallacy of the argument lay in the assumption that Hooper was the agent of the insurance company. In the case of New York Life Insurance Co. v. Head, supra, the court simply held that a policy of insurance issued in Missouri and its provisions controlled and governed by the statutes of that State might be affected by a loan agreement made in New York in such a way as to change the liability of the insurer under the laws of Missouri. The loan was applied for by the beneficiary from New Mexico to the company in New York, and the court held that the loan agreement was a New York contract.

Now the defendant company was not a corporation of Florida, nor was it doing business in this State by and through any of its officers or agents so the pleadings admit. The only question therefore, so far as this point is concerned is, were the contracts sued upon Florida contracts, or were they made and executed in Penn-
71 sylvania? The rejoinder avers that the contracts sued on "were written and executed by the defendant in the State of Pennsylvania and thereupon delivered and sent by mail to the said Lowry and Prince at Tampa, Florida, as brokers of the plaintiff,"

"That Lowry and Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account, to waive any provisions in the contract sued on or to represent it in any manner, shape or form," etc. These averments of fact being well pleaded were admitted by the demurrer. If, however, the rejoinder contains any averments which are inconsistent with or contradictory of those quoted it should be held to be bad on the demurrer; or if the language used has on its face two intendments, it will be tested by the weaker.

The attack made by the demurrer upon the rejoinder, however, can in the nature of the case receive no assistance whatever from the sections of the General Statutes referred to, until it appears from the pleadings that the contracts of insurance are Florida contracts, because until that is established they cannot be affected or controlled by the laws of Florida. The defendant is not a Florida corporation. It was not at the time the policies were issued nor had been represented in this State by any officer or representative, nor do the policies themselves contain any clause as to the intention of the parties concerning any place according to the laws of which they desired the contracts to be governed. Nor do they provide that the payment of the premium shall be a condition precedent to their taking effect. All this is shown by the pleadings and exhibits A and B, which are made part of the declaration. When the contracts were entered into therefore if Lowry and Prince were not the defendant's representative or agents then neither the proposition, acceptance nor delivery if necessary was made in this State. There was nothing so far as the defendant was concerned to which the statute could apply. If the contracts were made in this State, then certainly they will be affected and controlled by the statutes
72 of this State; but if they were not made here, but were made in some other jurisdiction, then as certainly the laws of this State do not control their provisions. Now the rejoinder expressly avers that the contracts were made in Pennsylvania, and denies that Lowry and Prince were defendant's representative. The court holds that inasmuch as the rejoinder admits that the defendant had written insurance on the plaintiff's property since 1908 continuously, and that Lowry and Prince transmited to the defendant at Philadelphia the applications for such insurance and received by mail the policies for the plaintiff, and transmitted for the plaintiff the amount of the premiums less the usual brokers' commission, it is subject to the demurrer because such admissions show that the policies sued on were Florida contracts. This conclusion does not follow because a policy of fire insurance is a personal contract which like all such contracts is completed by the signature of the parties and the transfer of the consideration. It is a parol contract, not a sealed instrument, and may be proved as other parol contracts. See authorities cited in note to Stephenson v. Allison, reported in 138 Am. St. Rep. 26. It is a simple contract of indemnity against loss by fire. See Paul v. Virginia, 8 Wall. (U. S.) 168. The making of such a contract is a mere incident of commercial intercourse.

See New York Life Ins. Co. v. Cravens 178 U. S. 389, 20 Sup. Ct. Rep. 962. And the situs of the contract or place of consummation is determined by the place of acceptance, and not by the place of proposal. See Peters v. E. O. Painter Fertilizer Co., decided at the present term of this court. In that case Mr. Chief Justice Browne, speaking for the court, said: "A contract of sale may be made by the acceptance of an offer to sell as well as by the acceptance of an offer to purchase, and where the last act necessary to complete the contract is performed, that is the place of the contract." The case follows the doctrine laid down by this court in Morgan v. Eaton, 59 Fla. 562, 52 South. Rep. 305, to which it refers. In the latter case the court, speaking through Mr. Justice Taylor, said:

73 "It seems to be well settled law that where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place and such proposal is there accepted, the place of acceptance, and not the place of the proposal, is the place of the contract. 22 Am. & Eng. Ency. Law, (2nd ed.) p. 1324, and numerous cases there cited." On this point therefore it is unnecessary to examine other authorities because the doctrine announced in the two cases cited is the settled law of this State, and by that doctrine this case must be tested as to the situs of the contracts sued upon for this court to be consistent.

Even when there is a local agent of the insurance company in the State where the property insured is located, but his authority is limited to receiving and forwarding applications to the insurer's home office for acceptance or rejection, there the contract will be deemed to have been made at such home office when a policy in substantial conformity to the application is mailed directly from such office to the insured or his agent in another State and no conditions precedent to its taking effect are expressly imposed and there is nothing in the transaction showing that the contract was intended to be left open until the receipt of the policy by the insured. See 2 Wharton on Conflict of Laws, 1011; State Mutual Fire Ins. Ass'n v. Brinkley Stave & Heading Co., 61 Ark. 1, 31 S. W. Rep. 157, 29 L. R. A. 712; Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 476; Rose v. Kimberly & Clark Co., 89 Wis. 545, 62 N. W. Rep. 526, 27 L. R. A. 556; Hartfort Steam-Boiler Ins. & Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 29 Atl. Rep. 629. The same rule applies where the policy is mailed to a third person who for the purposes of the transaction was, or was deemed to be the agent of the insured. See French v. People, 6 Colo. App. 311, 40 Pac. Rep. 463; Commonwealth Mut. Fire Ins. Co. v. William Knabe & Co. Mfg. Co., 171 Mass. 265, 50 N. E. Rep. 516; 3 Am. & Eng. Ency. Law, 551; May on Insurance, Sec. 66; Baker v. Spaulding, 71 Vt. 199, 42 Atl. Rep. 982; Galloway v. Standard Fire Ins. Co., 45 West Va. 237, 31 S. E. Rep. 939.

74 The deposit of the policy in the mail at the home office of the insurer is a delivery and charges the insured with constructive notice of the acceptance of the proposition. Galloway v. Standard Fire Ins. Co., supra. The policies which are made part of the declaration contain clauses that they "shall not be valid until countersigned by the duly authorized agent of the company at Philadelphia, Pa." They were countersigned there as shown upon their face.

Now it cannot be said from the pleadings in this case that either notice to the plaintiff of the acceptance of its application by the defendants for the insurance, or the delivery of the policies to the insured or the payment of the premium by the insured were conditions precedent to the taking effect of the policies; nor can it be said that the insertion of the warranty was a condition imposed by the defendant materially changing the terms of the original proposition. As to the latter proposition it will be observed that the policies sued on are attached to the declaration and made a part of it by apt words. They contain the warranty on their faces. The plaintiff alleged in its replication that "Lowry and Prince caused the defendant to write the said first policy of 1908 and said Lowry and Prince caused and procured the defendant to renew said policy from time to time and to finally write and issue policies here sued on" etc. From this allegation it appears that the application for the policies sued on contemplated the insertion of the warranty mentioned which from the pleadings appears to have been contained in the policies issued prior to those sued on which seem to have been issued in the usual form containing the same warranties and conditions. I do not regard either the notice of acceptance by the defendant of the application for insurance nor the delivery of the policy to the plaintiff as conditions precedent to their taking effect because this court has held that the contract is consummated where the acceptance of the proposition takes place, not where notice of acceptance is received or delivery made, besides delivery of a policy of insurance is not essential
75 to its validity. It is a simple, not a sealed contract and may be sued on although there has been no delivery of it to the insured. If the payment of the premium is regarded by some authorities as an implied condition precedent to the consummation of the contract it has not been so held in this State, which holds to the doctrine as stated that the place of acceptance of the proposition determines the place of the making of the contract; but whether that is true or not the determination of the point is unnecessary as the rejoinder avers that Lowry and Prince were not authorized to receive money on defendant's account, and that the plaintiff transmitted to the defendant by mail the amount of the premium through Lowry and Prince, which fact was admitted by the demurrer. Therefore it appears from the pleadings that the premium was paid not in this State, but in Pennsylvania.

There is no distinction between the contracts considered in the two Florida cases cited and the contracts sued on in this case that requires the application of different rules of law to determine their situs because a contract of insurance like the contracts involved in the two Florida cases cited is a personal contract and is a mere incident of commercial intercourse and is consummated or executed at the place of acceptance, and delivery is not necessary to its completion. See Stephenson v. Allison, 165 Ala. 238, 51 South. Rep. 622, 138 Am. St. Rep. 26. Now the proposition to insure was made by the plaintiff through Lowry and Prince, its agents, by letter to the defendant at Philadelphia; so much the pleadings admit. The proposition was accepted by the defendant at Philadelphia, and there the contracts were written and signed and there delivered to the United States postal service to be transmitted to Lowry and Prince

for the plaintiff; this the pleadings also show. When then did Lowry and Prince become the representatives of the defendant in the making of the contract? Not when they received the premiums from the plaintiff, because that was the plaintiff's act; besides, the contracts had then been executed. Nor when they transmitted the premiums to defendant by mail, because that was also the
76 plaintiff's act. If the sections of the General Statutes referred to were intended to operate only upon the act of Lowry and Prince and affect them only, the case of Hooper v. State of California, supra, would be in point, and no doubt the case would be authority for holding them to answer to the statute's provisions; but in my opinion the statute cannot be made to operate through them upon a person or corporation beyond the limits of the State and affect the provisions of a contract made elsewhere.

The act of Lowry and Prince in retaining from the amount of the premiums which they were instructed by the plaintiff to forward to the defendant the "usual brokers' commission" did not have the effect of changing the situs of the contracts and constitute them the defendant's agents for "all intents and purposes" so that they could alter the terms of the contracts which had been made in Pennsylvania. That is to say, constitute them the agents of the defendant to make a new contract of insurance or waive any warranty in the old ones. The case of Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131, referred to in the majority opinion is not in my judgment in point, because in that case the policies of insurance under consideration were Wisconsin contracts, and the court merely held that under a statute similar to the Florida statute one who procures insurance for another may be the agent for some purposes of both the insurer and insured. In the case of Schomer v. Hekla F. Ins. Co., 50 Wis. 575, 7 N. W. Rep. 544, the defendant company was doing business in Wisconsin directly through local agents to whom Lawson who was employed by plaintiff to obtain insurance applied for the policies, and it appears that they were executed in Wisconsin. In the case of Rose v. Kimberly & Clark Co., 89 Wis. 545, 62 N. W. Rep. 526, 27 L. R. A. 556, which was a suit on a policy of insurance by the receiver of the company for an assessment, it appeared that the policy was written in Illinois by a company not authorized to do business in Wisconsin. The court applied the Lex Fori and held that the contract could not be enforced in Wisconsin, but not doubting that it was a valid contract of Illinois. See also 5 R. C. L. p. 941. In the case of Presby-
77 terian Ministers' Fund v. Thomas, 126 Wis. 281, 105 N. W. Rep. 801, also cited in the majority opinion the court had under consideration a statute of Wisconsin which prohibited any corporation from doing any business of insurance of any kind in Wisconsin or with any resident of that State except according to the conditions and restrictions of the statute. A resident of Wisconsin applied by letter to the Insurance Company at Philadelphia for life insurance. The application was accepted, the policy sent to the applicant who gave his notes for the premium payable at Philadelphia. The company had not complied with the conditions and restrictions of the Wisconsin statute. The note was not paid and the company brought suit in Wisconsin to recover on the note. The court held

that the contract was made in Philadelphia, but as it was made with a resident of Wisconsin contrary to the laws of that State, it would not be enforced in that State. In Wisconsin Cent. R. Co. v. Phœnix Ins. Co., 123 Wis. 313, 101 N. W. Rep. 703, the question is not discussed, but it appears that the Insurance Company was represented in Wisconsin by agents and the policies issued in that State. In Wicks Bros. v. Scottish Union & National Ins. Co., 107 Wis. 606, 83 N. W. Rep. 781, the question was upon the right to cancel. The court held that the right to cancel exists only by contract. The policies were issued in Wisconsin. The other Wisconsin cases referred to are deemed to be not in point as the contracts sued upon were made in the State of Wisconsin by the defendant's acknowledged agents. It is undoubtedly true that considerations of public policy demand that an insurance company entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business transacted there, as was said by Mr. Justice Harlan in Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 204 U. S. 8, 27 Sup. Ct. Rep. 236, yet such assent cannot be assumed as to business transacted in another State although with citizens of the former State. The defendant in this case, according to the pleadings, transacted no business in Florida through its officers or agents, and
78 therefore did not subject itself to any provision of the statutes of this State. It had a right to enter into the contract of insurance in Pennsylvania with a citizen of Florida for the purpose of insuring the latter's property in this State which it did. Any act of the legislature which would impose upon the defendant in such case, without its consent, conditions and liabilities which it did not assume by the contract would be invalid. See Allgeyer v. State of Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427. The act therefore should not be given that construction.

The case of Miller Brewing Co. v. Council Bluffs Ins. Co., 95 Iowa 31, 63 N. W. Rep. 565, decided in 1895 upon a contract made in 1887 where the Supreme Court of that State held in effect that the mere writing of insurance upon property located in one State by a foreign insurance company of another State at its home office was the transaction of business in the former State I think is contrary to the view entertained by the Supreme Court of the United States in Allgeyer v. State of Louisiana, supra. I think the order of the court sustaining the demurrer to the rejoinder was erroneous, and the judgment should be reversed.

Taylor, J., concurs.

79 Whereupon, to wit, on the 20th day of October, A. D. 1917, a judgment was duly rendered and entered in said cause by said Supreme Court of Florida, which order is in the words and figures following, to-wit:

"AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

v.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Defendant in Error.

"A Writ of Error to a Judgment of the Circuit Court within and for the County of De Soto.

"This cause having been submitted to the Court at a former term thereof upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed; it is further ordered by the Court that the defendant in error do have and recover of and from the plaintiff in error, its costs by it in this behalf expended, which costs are taxed at the sum of $—, all of which is ordered to be certified to the Court below.

"The opinion of the Court, concurred in by Mr. Chief Justice Browne, Mr. Justice Whitfield and Mr. Justice West in this cause was this day read and ordered to be filed.

"A dissenting opinion in said cause was read by Mr. Justice Ellis in which Mr. Justice Taylor concurred."

80 And thereafter, to-wit, on the 27th day of October, A. D. 1917, came the plaintiff in error and filed in said Supreme Court of Florida a petition for rehearing in said cause, which petition for rehearing is in the words and figures following, to-wit:

81 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

vs.

KING LUMBER AND MANUFACTURING COMPANY, a Corporation, Defendant in Error.

To the Honorable Justices of the Supreme Court of Florida:

Your petitioner, American Fire Insurance Company, would respectfully show unto the Court that this case is one of great importance, both by reason of the questions involved and the fact that the decision of this Court is subject to review by the Supreme Court of the United States, and your petitioner believes that the majority opinion overlooks material considerations, due possibly to the fact that your petitioner failed to properly present the same to the Court,

under the impression that the record conclusively showed a state of facts which precluded the conclusion arrived at in the majority opinion as to the situs of the contracts, and your petitioner respectfully submits to the Court that the majority opinion is unsound for the reasons hereinafter stated:—

1st. The majority opinion misconceives the scope and purpose of Section 2765 of the General Statutes. The opinion properly points out that a broker effecting insurance may in some cases act in a dual capacity, and in some cases there may be doubt as to whether the broker is agent of the insurer or insured. The effect of the
82 Statute is to settle such questions by making persons falling within the category of the Statute to all intents and purposes representatives of the insurer in respect of what they do at the time in the particular transaction. In other words, if they receive or receipt for money they do so as agents of the insurer, and the same is true of any other step they take, in making or causing to be made a contract of insurance. In regard to such steps taken, they are to all intents and purposes representatives of the insurer, but, as pointed out by the Supreme Court of the United States, the statute does not undertake to make any person falling within its categories an agent of the insured to all intents and purposes, outside of the particular transaction effected by or through him, because to do so would involve the conversion of a special agent with limited authority into a general agent with unlimited power. In short, the statutory agency is limited to the particular acts done, and does not extend beyond or after their performance, so that the statute is to be read as if it contained the words "in so doing shall be deemed to all intents and purposes" etc. This is consonant not only with reason, but with all the former decisions of this Court; and the construction placed upon the Statute by the majority opinion is not only opposed to the construction placed upon it by the Supreme Court of the United States, but is unreasonable in itself and convicts this Court of misunderstanding the Statute in a number of cases of which Insurance Co. vs. Lewallen, 56 Fla., 246, is a conspicuous example.

If a power of attorney were granted an agent to do certain acts, and it were therein declared that he should be to all intents and purposes an agent of the principal, that would not enlarge his powers beyond those enumerated, any more than does the familiar conclusion of an ordinary power of attorney, ratifying and con-
83 firming all acts he may do thereunder.

It would be a startling doctrine that a mere insurance solicitor should possess all the powers of the general manager or directors of an insurance company, and it would be equally startling that every one engaged in effecting a contract of insurance, directly or indirectly, however humble his part, should possess equal powers, and powers equal to those of the company's highest officers. Suppose an insurance solicitor executed a note for $10,000 in name of his company, would this Court enforce the note against it on the theory that the solicitor was "to all intents and purposes" its agent? Your petitioner respectfully submits that the Legislature never intended such an absurdity, and that it is demonstrated to a certainty that the construction placed upon the Statute by the majority opinion is inadmissible. Moreover the construction given by the majority

to Section 2765 leaves Section 2777 without any field for operation, while it has a proper field for operation upon the true construction of the former section.

Your petitioner respectfully submits that this ground of its petition for rehearing presents a question of great importance in insurance litigation in this state, and that this Court is bound to be embarrassed hereafter if it adheres to the rule of construction asserted in the majority opinion, which, so far as it is aware, has never been intimated or suggested in any former decision of this Court, such former decisions having applied the statute only in the manner and to the extent contended for by your petitioner.

2nd. The majority opinion states:—"The question which we are called upon to answer is, did the Circuit Court attempt to extend the operation of these two statutes into the State of Pennsylvania? The answer to be given to this question depends upon whether the contracts of insurance must be held to be Florida or Pennsylvania contracts". It concludes that they were Florida contracts, and in so doing overlooks the following facts shown by the records—

84 (*a*) They were declared upon in the declaration as Pennsylvania contracts, effected in the State of Pennsylvania on April 8th, 1912, the date they were signed there by the officer of the Insurance Company.

(*b*) The policies upon their faces showed that they became operative in the State of Pennsylvania, when signed by the Company's agent at Philadelphia.

(*c*) It was lawful to make such contracts in Pennsylvania, but unlawful to make them in Florida, and the Court, in order to declare them Florida contracts had to presume an intention on the part of both the Insurance Company and Lowry and Prince to violate the laws of Florida.

(*d*) Not only did the plaintiff declare upon the contracts as Pennsylvania contracts, which the declaration relied upon and accepted in their entirety, but they contained provisions which were valid under the laws of Pennsylvania and invalid under the laws of Florida, viz., that "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this Company"; and the further provision that "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or other representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The majority opinion makes the contracts different from those declared upon, as well as effective at a different time and place.

(*e*) The majority opinion overlooks the rule that prima facie the lex loci contractus must prevail, and goes even to the extent
85 of presuming an intention to violate another law, and one not the proper law of contract.

(*f*) The majority opinion overlooks the fact that the demurrer to the rejoinder, as well as the plaintiff's own declaration, admitted that the policies were Pennsylvania contracts, executed in Pennsylvania.

Your petitioner respectfully submits that it was impossible for the Court to find as a fact, contrary to the admissions of the record, and in violation of all rules as to presumptions, that the policies were Florida contracts. The record is conclusive on the Court, that they were not Florida contracts. Your petitioner respectfully submits that the majority opinion merely begs the question by assuming that the policies are Florida contracts in order to so hold.

3rd. The majority opinion, in intimating that a request of Lowry & Prince, for information as to the subject-matter insured and the companies carrying insurance thereon, made them the insurer's agents obviously erred, because an insurer has always a right to demand information of that character from an insured or its agents. Not only that, it could cancel the policies for material error in information given in response to its request. Moreover, the rejoinder expressly averred, and the demurrer admitted, that Lowry & Prince were not authorized to represent the Company in any manner, shape or form, and this Court could not assume they did represent it in communicating information regarding the subject-matter insured. It was because the Insurance Company was not doing business in Florida and had no agents in Florida, to make inspections, etc., that it required the existence of concurrent insurance with a reliable company doing business in Florida, which presumably would look after the risk, so that the reference in the majority opinion to its being a matter of common knowledge that insurance companies make
86 such inspections is out of place.

4th. The majority opinion predicates the agency of Lowry and Prince under the statute upon the erroneous conclusion that the policies were Florida contracts, and it can predicate it upon nothing else, because the demurrer admits that in point of fact Lowry and Prince were not agents of the Insurance Company, or authorized to represent it in any manner, shape or form.

5th. In reality the underlying thought of the majority opinion is, not that the contracts were Florida contracts, but that your petitioner by writing at its home office in Pennsylvania policies on property in Florida, and renewing the same, should be held to be doing business in Florida, and in that respect the decision is directly contrary to Allgeyer vs. Louisiana, 165 U. S., 578, Insce. Co. vs. Head, 234 U. S., 149, Assce. Co. vs. McDonough, 204 U. S., 8, and Provident, &c., Society vs. Kentucky, 239 U. S., 103, on a question on which this Court is bound by the decisions of the Supreme Court of the United States.

6th. The majority opinion is directed contrary to the decision in Erickson vs. Insce. Co., 62 Fla., 161, in this Court, under which the only remedy of the plaintiff was in a Court of equity, by suit for reformation of the policies, conceding the truth of the facts alleged by it, and the applicability of the Florida Statute as making Lowry and Prince agents of defendant, and that it made them general agents of the defendant.

7th. In dealing with the subject of departure the majority opinion overlooks the fact that the position of the plaintiff in its replications was to insist upon different contracts, governed by a different system of law from that applicable to the case set forth in their declaration, and to deny the validity in part of the contracts set
87 forth in their declaration in which they were declared upon

and treated as valid, than which it would be difficult to conceive of a clearer case of variance from the cause of action declared upon.

Wherefore, your petitioner respectfully prays that a rehearing may be granted, and upon such hearing the judgment from which the writ of error is prosecuted be reversed.

And your petitioner will ever pray, etc.

JAMES F. GLEN,
*Counsel for Petitioner.*

88 And thereafter, to-wit, on the 5th day of November, A. D. 1917, did render and file its opinion denying the said petition for rehearing, which said opinion is in the words and figures following, to-wit:

89 In the Supreme Court of Florida, June Term, A. D. 1917, De Soto County.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

v.

KING LUMBER AND MANUFACTURING COMPANY, a Corporation, Defendant in Error.

On Rehearing.

PER CURIAM:

The declaration is in the statutory form and alleges that the "defendant issued to the plaintiff its two certain policies of insurance on the 8th day of April, 1912, and thereby promises" &c. The policies were not "declared upon in the declaration as Pennsylvania contracts, effected in the State of Pennsylvania on April 8th, 1912, the date they were signed there by the officers of the insurance company."

Section 2765, General Statutes, 1906, defines who "shall be deemed to all intents and purposes an agent or representative of" any insurance company as follows: "Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly

90 makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

Any person or firm in this State doing the acts defined in this section for any insurance company, by the terms of the law "shall b

deemed to all intents and purposes an agent or representative of such company." This does not limit the agency "to the particular acts" done by the agent or representative for the insurance company.

The demurrer to the rejoinder does not admit asserted conclusions of law that Lowry & Prince were not agents of the insurance company and as to the situs of the contract. In the rejoinder facts are alleged that the court holds to be sufficient to make Lowry & Prince the agents of the insurance company under the statute and that such agency makes the policy subject to the jurisdiction of this State.

Rehearing denied.

Browne, C. J., and Whitfield and West, JJ., concur.

Taylor and Ellis, JJ., dissent.

91 Whereupon on the 5th day of November, A. D. 1917, the said Supreme Court of Florida did make and enter its order denying said petition for rehearing, which said order is in the words and figures following, to-wit:

92 AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

v.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Defendant in Error.

A petition for rehearing having been filed in said cause, and same having been duly considered by the Court; it is ordered and adjudged by the Court that the said petition be, and the same is hereby denied.

93 STATE OF FLORIDA,
*County of Leon:*

I, G. T. Whitfield, Clerk of the Supreme Court of the State of Florida, do hereby certify that the foregoing pages numbered from one to ninety-two, inclusive contain true and correct copies of the records filed and the proceedings had in the Supreme Court of the State of Florida in the case of American Fire Insurance Company, a corporation, plaintiff in error, v. the King Lumber & Manufacturing Company, a corporation, defendant in error, and of the opinions and decision of the said Supreme Court filed in said case on the 20th day of October, A. D. 1917 and of the judgment of said Court entered therein on said 20th day of October, A. D. 1917 and of the opinion and order of said Court denying the petition for rehearing therein filed and entered on the 5th day of November, A. D. 1917 as the same appear from the originals now on file and of record in my office as Clerk of the Supreme Court of the State of Florida.

Witness my hand and Official Seal at Tallahassee, the Capital of the State, this the 17th day of November, A. D. 1917.

[Seal Supreme Court of the State of Florida.]

G. T. WHITFIELD,
*Clerk Supreme Court, State of Florida.*

94 And thereafter to-wit, on the 13th day of November, A. D. 1917, came the plaintiff in error, American Fire Insurance Company, a corporation, and filed in the said Supreme Court of Florida a petition for a writ of error to the Supreme Court of the United States, which petition for writ of error is in the words and figures following, to-wit:

95 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER AND MANUFACTURING COMPANY, Defendant in Error.

Now comes American Fire Insurance Company, a corporation, plaintiff in error, conceiving itself aggrieved by the final judgment of the Supreme Court of the State of Florida, made and entered on the 20th day of October, A. D. 1917, in the above stated cause, whereby it was considered and adjudged by the said Supreme Court that the final judgment of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for the County of De Soto, should be and was affirmed, and hereby petitions the Honorable Jefferson B. Browne, Chief Justice of the said Supreme Court, for an order allowing a writ of error in the said cause, to the end that the said judgment of the Supreme Court of Florida may be reviewed by the Supreme Court of the United States of America as provided by the laws of the United States, returnable to the said Supreme Court of the United States, according to the laws of the United States in that behalf made and provided, and also that an order may be made herein fixing the amount of security which the said plaintiff in error shall give and furnish upon the said writ of error, to the end that the same may operate as a supersedeas, and that thereupon all further proceedings in this Court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

96 And your petitioner will ever pray, etc.

JAMES F. GLEN,
*Counsel for Plaintiff in Error.*

97 And thereupon, to-wit, on the 13th day of November, A. D. 1917, came the plaintiff in error, American Fire Insurance Company, a corporation, and filed in the Supreme Court of Florida its assignment of errors herein, the same being in the words and figures following, to-wit:

98 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER AND MANUFACTURING COMPANY, Defendant in Error.

Now comes the plaintiff in error in the above stated cause and files the following as an assignment of the errors it intends to rely upon in the Supreme Court of the United States on its writ of error prosecuted thereto in the said cause, viz.:

1st. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon were made subject to the provisions of the laws of Florida, and thereby denied full faith and credit to the laws of Pennsylvania, in which State the policies were effected.

2nd. The Supreme Court of Florida erred in holding and deciding that the laws of Florida could operate to affix in invitum the status of agency for the insurer upon brokers of the insured, who effected insurance with a Pennsylvania corporation, in the State of Pennsylvania, in violation of Section 1 of Article Four of the Constitution of the United States, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3rd. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon, although effected in Pennsylvania, were Florida contracts, so as to make applicable thereto the Statutes of Florida, as construed by the said Court.

99 4th. The construction given by the Supreme Court of Florida to Sections 2765 and 2777 of the General Statutes of Florida denied to the plaintiff in error the right guaranteed by Section One of Article Four of the Constitution of the United States, to have full faith and credit given in Florida to the laws of Pennsylvania.

5th. The construction given by the Supreme Court of Florida to Sections 2765 and 2777 of the General Statutes of Florida violated Section One of the Fourteenth Amendment to the Constitution of the United States.

6th. The construction given by the Supreme Court of Florida to Sections 2765 and 2777 of the General Statutes of Florida violated Section Ten of Article One of the Constitution of the United States, by impairing the obligation of the contracts sued upon.

JAMES F. GLEN,
*Counsel for Plaintiff in Error.*

100 And thereupon the Chief Justice of the Supreme Court of Florida made and filed in the said Court an order granting the petition hereinbefore mentioned for a writ of error in said cause to the Supreme Court of the United States, which said order is in the words and figures following, to-wit:

101 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER & MANUFACTURING COMPANY, Defendant in Error.

At a stated term, to-wit, the June Term A. D. 1917, of the Supreme Court of the State of Florida, held at the courtroom in the city of Tallahassee, Florida, on the 13th day of November, 1917, upon the motion of James F. Glen, attorney for the above named plaintiff in error, and upon filing a petition for writ of error and an assignment of errors, and it appearing that in the judgment of the Supreme Court of Florida to which said writ of error is prayed, in the several respects in which the same is questioned by the said assignment of errors, there was drawn in question the validity of a Statute of, or authority exercised under, the State of Florida, on the ground of their being repugnant to the Constitution of the United States, and the decision being in favor of their validity.

It is therefore ordered that a writ of error be and the same is hereby allowed, to have reviewed in the Supreme Court of the United States the judgment of the said Supreme Court of the State of Florida, heretofore rendered in this cause, the same to be returnable according to law, and the amount of security upon the said writ of error is hereby fixed at the sum of $1000.00.

Done and ordered this 13th day of November, A. D. 1917.

JEFFERSON B. BROWNE,
*Chief Justice of Supreme Court of the State of Florida.*

102 And whereupon, to-wit, on the 13th day of November, A. D. 1917, the said plaintiff in error, American Fire Insurance Company, a corporation, filed in the Supreme Court of Florida a supersedeas bond as required by said allowance of writ of error herein, which bond, with its approval by the Chief Justice of the said Supreme Court of Florida is in the words and figures following, to-wit:

103 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER & MFG. COMPANY, Defendant in Error.

Know all men by these presents: That the Insurance Company of the State of Pennsylvania, as successor to the American Fire Insurance Company, a corporation organized and existing under the laws of the State of Pennsylvania, as principal, and United States Fidelity and Guaranty Company, a surety company organized and existing under the laws of the State of Maryland, and duly author-

ized under the laws of Florida to do business, as surety, are held and firmly bound unto King Lumber & Manufacturing Company, a corporation organized and existing under the laws of Florida, in the penal sum of $1,000.00, for the payment whereof well and truly to be made they hereby bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed on this, the 13th day of November, A. D. 1917.

The condition of the foregoing obligation is such that, whereas the above named principal has sued out a writ of error from the judgment of the Supreme Court of the State of Florida in a certain cause therein pending wherein it was plaintiff in error and the above named obligee was defendant in error, rendered in the June Term A. D. 1917, of the said Supreme Court of Florida, wherein the said Court affirmed a certain judgment of the Circuit Court of the Tenth Judicial Circuit of Florida in and for De Soto County, the
104 said writ of error being returnable to the Supreme Court of the United States at Washington on the 11th day of December, A. D. 1917.

Now, if the said principal shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall become null and void, otherwise it shall remain in full force and virtue.

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
As Successors to AMERICAN FIRE INSURANCE COMPANY,
By JAMES F. GLEN, [SEAL.]
*Attorney in Fact, Principal.*
[Corporate Seal.] UNITED STATES FIDELITY & GUARANTY CO.,
By JAMES C. McKAY,
*Att'y in Fact, Surety.*

Taken and approved this 13th day of November, A. D. 1917.

JEFFERSON B. BROWNE,
*Chief Justice of Supreme Court of Florida.*

105 And on the 13th day of November, A. D. 1917, the attorney and counsel for the aforementioned plaintiff in error herein filed in said Supreme Court of Florida a præcipe giving directions to the Clerk of said Court for making up transcript of the record and his return in said Court to the Supreme Court of the United States, which præcipe is in the words and figures following, to-wit:

106 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER & MANUFACTURING COMPANY, Defendant in Error.

In making up the transcript of record for the Supreme Court of the United States in the above stated cause, the Clerk of the Supreme Court of Florida will incorporate into and make parts of the said transcript the following proceedings, and no others, namely:—

1. Transcript of record from Circuit Court as filed in Supreme Court, omitting index, directions for making it, and Clerk's certificate.
2. Judgment of Supreme Court of Florida.
3. Petition for rehearing.
4. Order denying petition for rehearing.
5. Petition for writ of error to United States Supreme Court.
6. Assignment of errors filed with foregoing petition.
7. Order allowing the said writ of error.
8. Supersedeas bond on said writ of error.
9. Opinion filed in the Supreme Court of Florida.
10. These directions for making up transcript.

JAMES F. GLEN,
*Counsel for Plaintiff in Error.*

Receipt of a copy of the foregoing directions is hereby acknowledged and it is agreed that the Clerk of the Supreme Court of Florida may make up the transcript of record in accordance therewith.

TREADWELL & TREADWELL,
*Counsel for Defendant in Error.*

107 UNITED STATES OF AMERICA,
*Supreme Court of Florida:*

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause with all things concerning the same and I further certify that the foregoing pages numbered from 94 to 106 inclusive, contain true and correct copies of the petition for writ of error and allowance thereof, of the writ of error bond, of the assignment of errors and of the directions to the Clerk for making up transcript of the record and receipt of attorneys for defendant in error for copy of such directions to the Clerk.

And I further certify that the original writ of error bond and copies of the original writ of error are now on file in my office as Clerk of the Supreme Court of the State of Florida.

In witness whereof I have hereunto subscribed my hand and af-

fixed the seal of said Supreme Court of Florida in the City of Tallahassee, the Capital, this the 21st day of November, A. D. 1917.

[Seal Supreme Court of the State of Florida.]

G. T. WHITFIELD,
*Clerk Supreme Court, State of Florida.*

108 UNITED STATES OF AMERICA, *ss:*

To King Lumber and Manufacturing Company, a corporation organized and existing under the laws of Florida, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's Office of the Supreme Court of the State of Florida, wherein American Fire Insurance Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this, the 13th day of November, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

JEFFERSON B. BROWNE,
*Chief Justice of Supreme Court of the State of Florida.*

The King Lumber & Manufacturing Company hereby accept service of the above citation.

TREADWELL & TREADWELL,
*Attorneys for the King Lumber & Manufacturing Company.*

109 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Florida before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between American Fire Insurance Company, a corporation, plaintiff in error, and King Lumber & Manufacturing Company, a corporation, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the

United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said American Fire Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 11th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should
110 be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 13th day of November in the year of Our Lord one thousand nine hundred and Seventeen.

[Seal Supreme Court of the State of Florida.]

F. W. MARSH,
*Clerk U. S. District Court, for the Northern District of Florida.*
By M. CHOATE,
*Deputy Clerk.*

Allowed by
JEFFERSON B. BROWNE,
*Chief Justice of the Supreme Court of the State of Florida.*

Filed in Supreme Court, November 13, 1917.
G. T. WHITFIELD,
*Clerk.*

111 [Endorsed:] In the Supreme Court of Florida, June term, A. D. 1917. American Fire Insurance Co., plaintiff in error, vs. King Lbr. & Mfg. Company, defendant in error. Writ of error. Filed Nov. 13, 1917. G. T. Whitfield, clerk Supreme Court.

Endorsed on cover: File No. 26,243. Florida Supreme Court. Term No. 776. American Fire Insurance Company, plaintiff in error, vs. King Lumber & Manufacturing Company. Filed November 27th, 1917. File No. 26,243.

United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said American Fire Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 11th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should
110 be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 13th day of November in the year of Our Lord one thousand nine hundred and Seventeen.

[Seal Supreme Court of the State of Florida.]

F. W. MARSH,
*Clerk U. S. District Court, for the Northern District of Florida.*
By M. CHOATE,
*Deputy Clerk.*

Allowed by
JEFFERSON B. BROWNE,
*Chief Justice of the Supreme Court of the State of Florida.*

Filed in Supreme Court, November 13, 1917.
G. T. WHITFIELD,
*Clerk.*

111 [Endorsed:] In the Supreme Court of Florida, June term, A. D. 1917. American Fire Insurance Co., plaintiff in error, vs. King Lbr. & Mfg. Company, defendant in error. Writ of error. Filed Nov. 13, 1917. G. T. Whitfield, clerk Supreme Court.

Endorsed on cover: File No. 26,243. Florida Supreme Court. Term No. 776. American Fire Insurance Company, plaintiff in error, vs. King Lumber & Manufacturing Company. Filed November 27th, 1917. File No. 26,243.

## SUBJECT INDEX.

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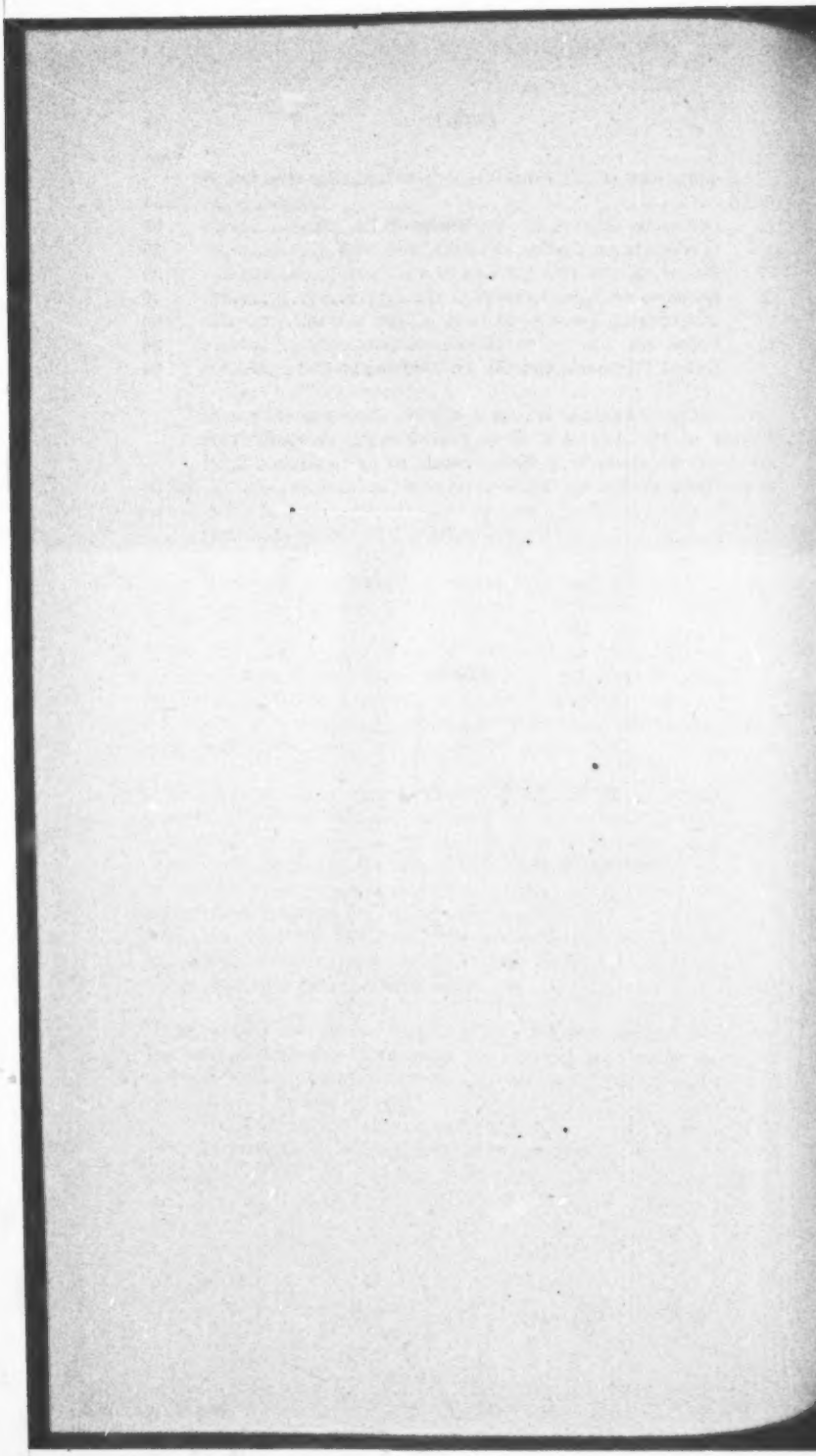
### I.



IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

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## No. 776.

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AMERICAN FIRE INSURANCE COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

*vs.*

KING LUMBER & MANUFACTURING COMPANY, A CORPORATION, DEFENDANT IN ERROR.

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## BRIEF FOR PLAINTIFF IN ERROR.

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This case was decided in the trial court on demurrer filed by King Lumber and Manufacturing Company, hereinafter called the Manufacturing Company, to a rejoinder of the American Fire Insurance Company, hereinafter called the Insurance Company, to certain replications of the Manufacturing Company to a plea of the Insurance Company. The trial court sustained the demurrer, and rendered final judgment thereon in favor of the Manufacturing Company

against the Insurance Company; hence there can be no controversy as to the facts, but solely as to the law.

The suit was upon two policies of insurance covering items constituting part of the plant and product of the Manufacturing Company. The policies were executed at the home office of the Insurance Company in Philadelphia on May 8, 1912, and the declaration declares upon them as effected and issued to the defendant on that date, and avers destruction of the premises insured in such circumstances as to come within the undertakings and promises of the policies. The policies were made by reference parts of the declaration and each contains a warranty in the following language:

> "Warranted same gross rate, terms and conditions as and to follow the American Central Insurance Company, of St. Louis, Mo., and that said Company has throughout the whole time of this policy, at least $5,000.00 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void."

*The proofs of loss were made parts of the declaration, and expressly averred the issuance of each policy at the agency of the Company in Philadelphia.*

The Insurance Company pleaded to the declaration that it was a Pennsylvania corporation, not engaged in the transaction of business in Florida, and having no agent or representative in Florida, and that the policies were made, executed and delivered in the State of Pennsylvania, and secured in that State by the Manufacturing Company through Lowry & Prince, of Tampa, Florida, as brokers of the Manufacturing Company, and the Insurance Company required the foregoing warranty to be inserted in the policies. The plea then averred that, without the knowledge of the Insurance Company, the American Central Insurance Company of St. Louis, Mo., had cancelled its policies prior to the fire, and at the time of the loss carried no insurance on the property.

The Manufacturing Company filed four replications to this plea, or a replication consisting of four parts, as said by the Supreme Court of Florida, insisting by way of reply upon four contentions as follows:.

> "*First.* That it denies that at the time the said policies went into force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, the defendant was transacting business within the State of Florida, and was in fact transacting business with the plaintiff. That on April 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by the policy of fire insurance on part of the property of the plaintiff, described in the policies sued on herein, and that the said policy of April 14, 1908, so written by the said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted with Lowry & Prince as to the nature of the risk assumed, and from time to time, from April 14, 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the physical condition of your repliant's property, and as to the advisability of assuming a risk thereon, and relied upon the said Lowry & Prince for its information on this subject. And repliant further shows that the said Lowry & Prince caused the defendant to write the said first policy in 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies

sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant. Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no agent or representative in the State of Florida, but states the fact to be that Lowry & Prince, who procured and caused said policies to be written, who collected the premiums and forwarded the same to the defendant, were the agents of the defendant.

"*Second.* For a further replication to said first plea, repliant says that it is true that the two fire insurance policies sued on in this cause contained the warranty set out in said plea. Repliant states the fact to be that Lowry & Prince, the agents of the defendant as aforesaid, when they delivered the policies so sued on to repliant, called repliant's attention to said warranty clause, and stated to repliant that said clause would not affect repliant, and should be disregarded by repliant and gave as their reasons why said warranty clause should be disregarded, that the repliant had at that time in the American Central Insurance Company of St. Louis, Mo., Six Thousand Five Hundred ($6,500.00) Dollars of insurance, covering the items insured by the policies of the defendant sued on herein.

"Repliant further says that it at that time was carrying a large amount of insurance, approximately Forty-Five Thousand ($45,000.00) Dollars in various companies, and that it did not keep up very closely with the amount of insurance that it had in any particular company, being careful only to keep the total amount approximately Forty-Five Thousand Dollars, in reputable old-line companies, and that it therefore relied upon the representation of the said Lowry & Prince, who stated that they had investigated the policies of repliant in the said American Central Insurance Company of St. Louis, Mo., and that repliant had Six Thousand Five Hundred Dollars of insurance, as aforesaid.

"Repliant further says that relying upon the repre-

sentation of said Lowry & Prince, agents of the said defendant, and relying upon their instructions to disregard said warranty, repliant accepted said policies, and paid the said Lowry & Prince the premium therefor, charged by the said defendant.

"*Third.* Replying further to said first plea repliant says: That sometime prior to July 25, 1912, Lowry & Prince as agents of the defendant aforesaid, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #308149, in the sum of One Thousand Five Hundred ($1,500.00) Dollars and suggested to repliant that there be substituted for the last-mentioned policy, a policy in a like sum in the People's National Fire Insurance Company of Philadelphia. This information coming from the said Lowry & Prince, the agents of the defendant, and this suggestion having been made by the agents of the defendant, repliant agreed to the cancellation of the said policy, and the substitution of a policy with the People's National Fire Insurance Company of Philadelphia.

"Repliant further says that some time prior to October 27, 1912, the said Lowry & Prince, the agents as aforesaid of the said defendant, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #303192, in the sum of One Thousand Five Hundred ($1,500.00) Dollars and the said Lowry & Prince suggested that there be substituted for the said last mentioned policy, a policy in a like amount in the American Union of Philadelphia.

"Said information and said suggestions being given by the agents of said defendant as aforesaid, repliant agreed that said last mentioned policy might be cancelled, and a policy in the American Union of Philadelphia substituted therefor.

"Repliant further says that the said Lowry & Prince, agents of the defendant as aforesaid, assured repliant that the cancellation of the policies above mentioned was not a violation of the warranty set forth in said plea, provided a like amount of insurance was carried in some other old-line insurance company.

"Repliant further says that as soon as said policies were cancelled, new policies were substituted in pursuance of said suggestion, in the companies above mentioned, and repliant therefore denies that said policies were cancelled without the knowledge of the defendant, but says that said policies were cancelled with the full knowledge and consent, and at the suggestion of Lowry & Prince, who were agents of said defendant as aforesaid, acting for it in the State of Florida, who, as such agents, had caused policies sued on to be issued, and who had collected the premiums paid by repliant for said policies sued on and forwarded the same to the said defendant, and that said defendant thereby waived said warranty clause, ratified and confirmed the cancellation of said policies of insurance in the American Central Insurance Company of St. Louis.

"*Fourth.* Further replying to said first plea, repliant denies that said policies of insurance so sued on, were delivered in the State of Pennsylvania, but states the fact to be that same were delivered by Lowry & Prince, as agents for said defendant, to repliant, within the State of Florida, and accepted by repliant within said State."

To these replications the Insurance Company filed the following rejoinder, to which a demurrer was interposed and sustained:

"That under the public laws of the State of Pennsylvania, which are entitled to full faith and credit in the State of Florida, the defendant is authorized to write and issue, in the State of Pennsylvania, policies of insurance on property outside the State of Pennsylvania, and in April, 1908, at Philadelphia, in the State of Pennsylvania, Lowry & Prince of Tampa, Florida, with whom the defendant had no connection or relations, as brokers of the plaintiff, made application to the defendant requesting it to issue a policy insuring the property of the plaintiff situate in Florida, which the defendant did, and thereafter, from time to time, on the written requests of the said Lowry & Prince, addressed to the defendant at Philadelphia, in the State of Pennsylvania, the defendant

continued to write and issue policies of insurance on the plaintiff's property, including those sued upon, but all of said policies were written and executed by the defendant in the State of Pennsylvania, and thereupon delivered and sent by mail to the said Lowry & Prince at Tampa, Florida, as brokers of the plaintiff, and each contained a similar warranty clause as to the existence of concurrent insurance on the property with an approved designated company doing business in the State of Florida, except that, from time to time, at the request of the said Lowry & Prince, the names of the companies were changed, as companies designated cancelled their risks on the property, and the name of the American Central Insurance Company of St. Louis, Missouri, was inserted in the contracts sued on at the special request of the said Lowry & Prince, stated by the said Lowry & Prince to the defendant to be made by them because they were agents for that company and would know of any cancellation by it, while some other company they did not represent might cancel without their knowledge; that the said Lowry & Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account, to waive any provisions in the contracts sued on, or to represent it in any manner, shape or form, but the plaintiff desired to secure, through them, insurance to the amount of $45,750.00, in accordance with a printed form prepared for the plaintiff by Lowry & Prince and annexed to the policies sued on, all of which they were unable to place with companies for which they were agents, and thereupon they transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission; and the defendant denies by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince for the defendant any premiums on the policies of insurance, written

by the defendant, and denies that Lowry & Prince were agents of the defendant, and denies that prior to the furnishing of proofs of loss by the plaintiff, it had any notice or knowledge that the American Central Insurance Company of St. Louis, Missouri, had cancelled its policies on the property insured and did not carry $5,000 on the identical subject matter and risk, and denies that it advised or consulted with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject matter insured, and the companies carrying insurance thereon."

The material provisions of the law of Florida regulating the transaction of business by foreign insurance companies are embodied in the succeeding sections of the General Statutes:

"2758. Statement prior to issue of certificate of authority.—No insurance company, association, firm or individual, whether incorporated or not incorporated, and whether incorporated or organized under the laws of this State, or of any other State or country, nor its agents, attorneys, subscribers or representatives, directly or indirectly, shall take any risk or transact any business of insurance in this State, unless such company, association, firm or individual has first obtained a certificate of authority from the State Treasurer under the direction of the Board of Insurance Commissioners; and before obtaining such certificate, such company, association, firm or individual shall furnish the Treasurer with a statement under oath of the president, vice-president or manager of the company, or of the attorneys, members, or subscribers severally of such association or firm, or of such individual showing: First, the name and locality of the company, association, firm or individual; Second, the amount of its capital stock and the amount paid up; the maximum amount for which each member or subscriber to any association or firm may become liable; Third, the amount of accumulations; Fourth, the assets of the company, association, firm or individual; including, 1st, the amount of cash

on hand and in the hands of agents or other persons; 2nd, the real estate unencumbered; 3d, the bonds owned by the company, association, firm or individual and how they are secured, with rates of interest thereon, and schedule; 4th, debts of the company, association, firm or individual, secured by mortgage; 5th, debts otherwise secured; 6th, debts on premiums; 7th, all other securities; Fifth, the amount of liabilities due or not due to, banks or other creditors, including reinsurance reserve on all risks in force; Sixth, losses adjusted and due; Seventh, losses adjusted and not due; Eighth, losses unadjusted; Ninth, losses in suspense waiting for further proof; Tenth, all other claims against the company, association, firm or individual; Eleventh, the greatest amount insured in any one risk; Twelfth, the act of incorporation or organization of such company, association, firm or individual; Thirteenth, the amount of gross receipts of such company, association, firm or individual, in the State of Florida during the preceding year. The Board of Insurance Commissioners shall cause to be prepared, and shall furnish to each insurance company, association, firm or individual, printed forms of the statement required. Such statement shall be filed in the office of the State Treasurer, together with a written agreement under the seal of the company, association, firm or individual, signed by the president and secretary of the company, or by its manager or by each subscriber of the association, or by the firm or individual, and agreeing on the part of said company, each subscriber of the association, firm or individual that service of process in any civil action against such company, association, or each subscriber thereof, or firm or individual, may be made upon any agent or representative of the company, association, firm or individual in this State, and authorizing such agent or representative for and on behalf of such company, each subscriber of the association, or firm or individual to admit such service of process on him and agreeing that the service of process upon any agent or representative shall be as valid and binding upon the company, each subscriber of the association, or firm or individual, as if made

upon the president or secretary, or each member or subscriber thereof."

"2759. Amount of assets; certificate; deposit of securities; life insurance companies; live stock insurance companies.—No insurance company, association, firm or individual, not of this State, nor agent nor representative thereof, shall transact any business of insurance in this State, unless such company, association, firm or individual is possessed of at least two hundred and fifty thousand dollars in value, invested in United States or State bonds, or other bankable interest-bearing stocks issued in the United States, at their market value. Upon complying with the preceding section and furnishing evidence to the satisfaction of the Board of Insurance Commissioners that such company, association, firm or individual has actually invested the amount above stated in such securities as hereinbefore mentioned, the State Treasurer shall issue a certificate thereof, with the authority of such company, association, firm or individual to transact the business of insurance in this State. Insurance companies incorporated under the laws of this State, or any association, firm or individual of the State, however, shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of the said Board that such company, association, firm or individual is possessed of, and has actually invested at least twenty-five thousand dollars in United States or State bonds or other bankable stocks or securities issued in the United States, at their market value, and by otherwise complying with the provisions hereof. The Board of Insurance Commissioners shall, in addition to the certificate hereinbefore provided for, issue a certificate to any insurance company incorporated under the laws of this State, and which shall have previously thereto deposited with the State Treasurer one hundred thousand dollars in United States or State bonds, or other negotiable stocks or securities issued in the United States, as their market value, as a guaranty fund for the security of the policy holders of such company, upon satisfactory evidence to them that such securities to such an amount have been deposited with the State Treasurer. Life insurance

companies incorporated or organized under the laws of another State shall be entitled to a certificate to transact the business of insurance in this State by furnishing to the satisfaction of the board that it is possessed of and has actually invested two hundred thousand dollars in United States bonds, or other bankable or interest-bearing stocks issued in United States at their market value, or in mortgages or unencumbered real estate worth double the amount loaned thereon, inclusive of buildings thereon, and by otherwise complying with the provisions thereof. Insurance companies insuring live stock or domestic animals, incorporated or organized under the laws of any other State, shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of the board that such company, association, firm or individual is possessed of, and has total assets of at least two hundred thousand dollars and by otherwise complying with the provisions hereof."

"2760. Renewal of statement, etc., and certificate.—The statement and evidence of investment required by the two preceding sections shall be renewed annually in the month of January in each year. The first statement may be made at any time when the certificate of authority is desired, and shall hold good until the succeeding January. The board, on being satisfied that the capital, securities and investments remain secure as at first, shall direct the State Treasurer to furnish renewal of certificate, as aforesaid, the certified copy of which, with the certified copy of the statement upon which the same was obtained, shall be filed, kept and published in the same manner and be governed in all respects as the original.

"2761. Revocation of certificate.—Whenever any insurance company, association, firm or individual doing business in this State, upon a reasonable request from said Treasurer shall refuse to comply with any of the provisions of this sub-chapter, and whenever it shall appear to the said board upon such examination, that in their opinion the assets of any such company, association, firm or individual are insufficient under these provisions to justify the continuance in business of any such company, association, firm or individual or that the condition of such

company, firm or individual is unsound, the Board of Insurance Commissioners shall forthwith revoke the certificate of authority granted on behalf of such company, association, firm or individual, and shall cause a notification thereof to be published in some newspaper published at the capital, and such company, association, firm or individual, or agent or representative of the same is, after such notice, required to discontinue the issuing of any new policy and the renewal of any previously issued; and whenever it shall appear upon such examination that any insurance company, association, firm or individual, its officers, representatives or agents have violated any of the provisions of this sub-chapter, the said board shall forthwith report the facts, with such statements and remarks as the board may deem expedient to the Attorney General, who shall at once prosecute said company, association, firm or individual, its officers, agent or representative."

"2765. Agents.—Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

"2766. Reinsurance only with authorized companies.—No fire insurance company or association authorized to transact business in this State shall reinsure, or enter into any contract to indemnify, any fire insurance company or association not authorized to transact business in this State against loss by fire to property located in this State."

"2767. Provisions relating to local agents.—All

policies or contracts of indemnity against loss by fire to property located in this State issued or entered into by any fire insurance company or association authorized to transact business in this State shall be issued and countersigned by a local agent who is a resident of this State, regularly commissioned and licensed to transact a fire insurance business herein, and such local agent shall receive on each policy the full and usual commission allowed and paid by such company or association to its agents on business written or done by them for it; *Provided, however,* That this section shall not apply to policies of reinsurance issued to another fire insurance company regularly authorized and transacting a general fire insurance business in this State, nor to policies of insurance on the rolling stock of railroad companies doing a general freight and passenger business."

"2768. Local agents not to divide commissions.—No fire insurance company or association authorized to transact business in this State shall request or permit any one acting as its agent and residing in this State to divide or offer to divide directly, or indirectly, the commission due to or received by any such agent with any other agent or broker or other person not a resident of this State."

"2769. Disqualification of local agents.—No fire insurance company or association authorized to transact business in this State shall be permitted to appoint or employ as its agents or representatives any person or persons who have divided or offered to divide, directly or indirectly, his or their commission or the profits of his or their business with any person or persons not a resident of this State, but shall immediately withdraw and cancel any such commission of authority to act as its agent in this State as may be held by any person or persons upon information that such person or agent has divided or offered to divide his or their commission with any person or persons not a resident of this State."

"2770. Renewal of licenses.—Renewal of license to transact the business of fire insurance in this State for companies or associations, shall only be issued after the secretary and manager of such company or

association so desiring to renew license to do business in this State, shall first have made oath that no policy or contract of insurance covering property located in the State of Florida has been issued, written or placed during the twelve months preceding, except by resident local agents of such company or association in Florida duly commissioned, and the said local agent has received the full, entire and usual commission due and allowed its agents, and that to the best of his knowledge and belief none of its agents or representatives in this State has divided or offered to divide his commission or other profits with any non-residents of this State, and that such company or association has not reinsured or entered into any contract to indemnify any fire insurance company or association not authorized to transact business in this State, and until and after such company or association shall have complied with all other laws of this State in respect to the admission of companies of other States or foreign countries."

"2771. Examination by Board of Commissioners.—Whenever the Board of Insurance Commissioners shall have received information that any fire insurance company or association has violated any of the provisions of this sub-chapter, they are authorized, at the expense of such company or association, to examine by themselves or their accredited representatives, at the principal office or offices of such company or association located in the United States of America, or in any foreign country, and also of such other offices or agencies of such company or association, as they may deem proper, all books, records and papers of such company or association, and may examine under oath the officers, managers and agents of such company or association as to such violation or violations. The refusal of any such company or association to submit to such examination or to exhibit its books and records for inspection shall constitute a forfeiture of its license as hereinafter provided for."

"2772. Revoking licenses of company.—If any fire insurance company or association shall violate or fail to observe and comply with any or all of the provi-

sions of this sub-chapter applicable thereto, it immediately shall become the duty of the Board of Insurance Commissioners to investigate same, and if the Board of Insurance Commissioners are themselves satisfied as to the guilt of the insurance company or association, it shall be the duty of the Board of Insurance Commissioners, in the manner now provided by law, to revoke the license of such company or association to transact business in this State, and such revocation shall continue for at least one year from the date thereof; nor shall any insurance company or association whose authority to transact business in this State shall have been so revoked be again authorized or permitted to transact business herein until it shall have filed in the office of the insurance commission a certificate signed by its president, or other chief officer, to the effect that the terms and obligations of the provisions of this sub-chapter are accepted by it as a part of the condition of its right and authority to transact business in this State."

"2777. Who agent of company.—Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

In sustaining the demurrer to the rejoinder the trial court held that section 2765 of the General Statutes of Florida applied (notwithstanding the averments of the rejoinder, that the policies were executed and delivered in Pennsylvania, and notwithstanding the averment that Lowry & Prince were not agents of the Insurance Company, or authorized to represent it in any manner, shape or form), and made Lowry & Prince agents of the Insurance Company. It further held that, regarding them as such agents, the Insurance Company was estopped from insisting upon the terms of the policies, by reason of the matters set up in the pleas, so that the disposition of the case was controlled by applying the statute to the case as disclosed in the pleadings.

On writ of error to the Supreme Court of Florida it was

contended by the Insurance Company that the application of section 2765 of the General Statutes of Florida, above quoted, to the contracts effected in the State of Pennsylvania, denied full faith and credit to the laws of Pennsylvania, violated the 14th Amendment to the Constitution of the United States, and violated Article VI of the Constitution of the United States, requiring the judges in every State to be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. By a divided court the judgment of the trial court was affirmed, and a writ of error thereupon allowed to this court.

The assignments of errors in this court are as follows:

1st. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon were made subject to the provisions of the laws of Florida, and thereby denied full faith and credit to the laws of Pennsylvania, in which State the policies were effected.

2nd. The Supreme Court of Florida erred in holding and deciding that the laws of Florida could operate to affix *in invitum* the status of agency for the insurer upon brokers of the insured, who effected insurance with a Pennsylvania corporation, in the State of Pennsylvania, in violation of section 1 of Article IV of the Constitution of the United States, and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

3rd. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon, although effected in Pennsylvania, were Florida contracts, so as to make applicable thereto the Statutes of Florida, as construed by the said court.

4th. The construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida denied to the plaintiff in error the right guaranteed by section 1 of Article IV of the Constitution of the United States, to have full faith and credit given in Florida to the laws of Pennsylvania.

5th. The construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida violated section 1 of the Fourteenth Amendment to the Constitution of the United States.

6th. The construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida violated section 10 of Article I of the Constitution of the United States, by impairing the obligation of the contracts sued upon.

## ARGUMENT.

### Fifth Assignment of Error.

By the fifth assignment of error it is contended that the majority of the Supreme Court of Florida construed section 2765 of the General Statutes of Florida, so as to make it violate section one of the Fourteenth Amendment to the Constitution of the United States. This presents a broader contention than those presented under the remaining assignments of error, and we shall discuss it first, as the contention, if sustained, makes it unnecessary to consider the narrower contentions, dependent upon the proposition that the contracts of insurance were Pennsylvania contracts, to which the Florida statute could not be applied, conformably to the provisions of the Federal Constitution.

The statute reads as follows:—

> "Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual aforesaid, for a policy of insurance or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association,

firm or individual, or who in any wise, directly or indirectly, makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

This act, it will be observed, is not confined to insurance companies, domestic or foreign, but applies equally to firms or individuals entering into contracts of insurance, and its constitutionality must be determined in view of its scope, regarding the situation of corporations and individuals within its terms as identical. Moreover, the laws of Florida expressly recognize the right of individuals and firms to engage in the insurance business, and they are classified together with corporations in all the laws regulating the transaction of fire insurance.

Gen. Statutes, secs. 2757, 2758, 2759, 2761, 2762.
State *vs.* Board of Ins. Commrs., 37 Fla., 564.

The determination of the question presented by this assignment of error, therefore, is in no way affected by the general doctrine as to the power of a State to exclude foreign corporations, or attach such conditions as it sees fit to their admission.

Carroll *vs.* Greenwich Ins. Co., 199 U. S., text 409.

The question is whether or not the Florida legislature could make the designated persons agents to all intents and purposes of any corporation, association, firm or individual entering into contracts of insurance; and in determining that question the court is bound by the construction placed upon the statute by the Supreme Court of Florida.

Chicago, &c., Ry. Co. *vs.* Minnesota, 134 U. S., 418.

The Supreme Court of Florida in this case not only applied the statute to policies effected in the State of Pennsylvania, but it also held expressly that the statutory agency was not

confined to the particular acts done by a person in the designated class, and that the statute made the designated persons agents to all intents and purposes in the broadest sense, contrary to the opinion of this court in Mutual Life Ins. Co. *vs.* Hilton Green, 241 U. S., 613, to which it referred, but stated it had the right to place its own construction on a Florida statute. The effect of the decision of the Florida court is that a girl sent out from the office of a local agent to collect overdue premiums can bind an insurer as effectually as any general agent could, not only in regard to the policies for which she is to collect, but also as to all other business of the insurer. And the decision further places every one, directly or indirectly effecting the insurance, or doing the other acts specified in the statute, however humble the capacity in which such person acts, on an equality, so far as their power to bind the insurer is concerned, and on an equality with any general agent of the insurer. It seems to us that the act, as thus construed, cannot be sustained as a legitimate exercise of legislative power. It may be conceded that there is reason, in considerations of public welfare, to justify legislation concerning the subject of agents of insurers, and it may be admitted that legislation could provide that any person who directly or indirectly causes any contract of insurance to be made, or does certain acts in connection therewith, should be regarded *prima facie* as an agent of the insurer to all intents and purposes, in respect of what he actually does in the particular matter. But the vice in the statute, as construed by the court, lies in the fact that it precludes all inquiry into the actual relations between the insurer and one who directly or indirectly procures the insurance and not only makes the latter an agent of the insurer in respect of the transaction in which he plays a part, but extends that agency so as to make it coextensive with the insurer's business.

Could the court uphold legislation that made a lawyer's stenographer his agent to all intents and purposes, in the sense the Florida court attributes to these words in this

statute? Or, a law that authorized every track-layer on a railroad to make traffic agreements in its behalf, or to waive provisions in such agreements made by its executive officers? Or, a law that authorized every stoker on a steamship to bind the vessel to the performance of a charter? Or, a law that authorized every porter of a manufacturing establishment to pledge its credit by executing negotiable paper?

In none of the cases suggested would the exercise of legislative power be so extreme as in the present case, because in each of the suggested cases the authority would devolve upon one who was an employee, and thus in some sense an agent, of the principal, while in the present case one who is actually employed by the party desiring to secure insurance is made an agent of the other contracting party, with unlimited authority to bind the insurer.

The constitutionality of the statute must be tested by its result under the construction placed upon it by the Florida court, and the following is an example of what may occur. A. is the owner of a large saw-mill. The difficulty of obtaining adequate insurance on such properties is notorious. He applies to B., a broker for insurance. B. tells him that he thinks it might be possible to induce C. to take a part of the risk, and A. authorizes B. to secure C. to do so. B. takes the matter up with C., and C., on the solicitation of B., representing A., enters into a contract to insure the property of A. On these facts, the statute, as construed, conclusively makes B. the agent of C. to all intents and purposes, not only in regard to the particular transaction effected by or through B. for A., but also as to C.'s general business, although this is in absolute contradiction of the facts. It seems to us that no more arbitrary exercise of legislative power, in derogation of the freedom to contract, could well be conceived, and that it cannot be sustained under the rule of reason applicable to such legislation.

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that

the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

Lawton *vs.* Steele, 152 U. S., text 137;
Adair *vs.* U. S., 208 U. S., 161;
Lochner *vs.* New York, 198 U. S., 45;
Allgeyer *vs.* Louisiana, 165 U. S., 578;
Coppage *vs.* Kansas, 236 U. S., 1;
Adams *vs.* Tanner, 244 U. S., 590;
Williams *vs.* Fears, 179 U. S., 270;
Moredock *vs.* Kirby, 118 Fed., 180;
Aikmann *vs.* Sanderson, 47 So., 600;
State *vs.* Kreutzberg, 114 Wis., 530;
Gulf, &c., R. Co. *vs.* Ellis, 165 U. S., 150.

This statute, as construed by the Florida courts in this case, conclusively makes the designated persons agents to all intents and purposes of the insurer, and forbids inquiry to determine the truth. The court so held in sustaining the demurrer to the rejoinder, which alleged that Lowry & Prince were not agents of the insurer or authorized to represent it in any manner, shape or form, and this brings into prominence another aspect in which the statute is obnoxious to the fourteenth amendment. The whole case of the Manufacturing Company depended upon establishing that Lowry & Prince were agents of the Insurance Company, as alleged by it, and not agents of the Manufacturing Company, as alleged by the Insurance Company; and it must be axiomatic that where matter of fact necessarily inheres in a cause of action, concerning which there is dispute, no statute can *conclusively* settle this matter of fact in favor of one class of litigants against another class, without denying the equal protection of the laws, as well as depriving the class discriminated against of property without due process of law.

"The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province."

II Wigmore on Evidence, Sec. 1353;
Mobile, &c., R. Co. *vs.* Turnipseed, 219 U. S., 35;
McFarland *vs.* Am. Sugar Ref. Co., 241 U. S., 79;
Hawkins *vs.* Blakely, 243 U. S., 210;
Harris *vs.* Stearns, 17 So. Dakota, 439;
Downs *vs.* Blount, 170 Fed., 15;
Howard *vs.* Moot, 64 N. Y., 262;
Little Rock, &c., R. Co. *vs.* Payne, 34 Am. Rep., 55;
People *vs.* Rose, 207 Ill., 352;
Vega *vs.* Con. Elevator Co., 75 Minn., 308;
Larson *vs.* Dickey, 39 Nebr., 463;
See also U. S. *vs.* Klein, 13 Wall., 128;
Kackel *vs.* Serviss, 167 N. Y. Supp., 348.

The case of Coe *vs.* Armour Fertilizer Works, 237 U. S., 413, which also went to this court from the Supreme Court of Florida, is somewhat similar in principle. In that case a Florida statute was condemned which permitted an execution to issue against an alleged stockholder of a corporation on an unpaid judgment against the corporation, without affording the alleged stockholder any opportunity for a hearing on the question whether or not he in fact bore that relationship to the corporation.

The contention now urged is clearly recognized in the case of Orient Insce. Co. *vs.* Daggs, 172 U. S., 557, in which the court distinguishes the case of an agreement constituting a valued policy from a conclusive presumption forced by law.

"It is one thing to attribute effect to the convention of the parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish a result against property and liberty."

172 U. S., text 566;

See also, Yazoo, &c., R. Co. *vs.* Bent, 22 L. R. A. (N. S.), 821.

**Second Assignment of Error.**

All of the remaining contentions on the part of the plaintiff in error are in reality embraced within the second assignment of error, which is as follows:

> "The Supreme Court of Florida erred in holding and deciding that the laws of Florida could operate to affix *in invitum* the status of agency for the insurer upon brokers of the insured, who effected insurance with a Pennsylvania corporation, in the State of Pennsylvania, in violation of section 1 of article four of the Constitution of the United States, and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States."

This assignment of error presents at the outset the question whether or not the policies were Pennsylvania contracts, and, if they were, whether or not the Florida laws could operate thereon in the respect in which they were given operation by the Florida courts. As we understand the decision of the majority in the Supreme Court of Florida it answered the first question by assuming an affirmative answer to the second, and thus begged the question; while the minority held that the contracts were Pennsylvania contracts, and that the law of Florida could not have the effect contended on the part of the Manufacturing Company, to make Lowry & Prince agents of the insurer and not of the insured. Correct thinking, as it seems to us, required an answer to the question whether or not the contracts were Pennsylvania contracts, independently of the purported scope of the

Florida statutes. Indeed, as we understand the opinion of the majority, it concedes this at the outset of the opinion, although it seems afterwards to lose sight of it. We shall reserve an analysis of the opinion, however, until discussion of the fundamental question.

A.

The declaration was the foundation of the plaintiff's case, and it should surely be possible to determine therefrom what were the contracts on which it relied. It made the policies parts of the declaration. They were executed at Philadelphia by a general officer of the Insurance Company on April 8, 1912, and the declaration alleges that "the said defendant issued to plaintiff its two certain policies of insurance on the 8th day of April, 1912, and thereby promised the plaintiff," etc. The policies provided they should not be valid "until countersigned by the duly authorized agent of the company at Philadelphia, Pa." There is no suggestion in the declaration that the policies first became effective in Florida, no allusion to anything that might indicate they were other than Pennsylvania contracts issued on the date alleged, and no claim that they were governed by any law other than the *lex loci contractus*. Beyond that, the Manufacturing Company's proofs of loss were made parts of the declaration, and these expressly averred the issuance of the policies at the Insurance Company's home office in Philadelphia (Transcript, pp. 5, 12). The policies themselves contained provisions in violation of the very statute of Florida which the court applied, *viz.*, that "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," and the usual non-waiver clause in the standard form of policy, providing that "No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to

such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The declaration asserted the policies in their entirety as the Manufacturing Company's cause of action, averred a loss within their terms, and undoubtedly declared upon them as contracts effected in Pennsylvania on April 8, 1912.

Com. Mut. Fire Insce. Co. *vs.* Fairbank Canning Co., 173 Mass., 161.

Stone *vs.* Penn. Yan., &c., Ry., 197 N. Y., 279.

Stone *vs.* Old Colony, &c., R. Co., 212 Mass., 459.

State Mutual Fire Insurance Co. *vs.* Brinkley, 61 Ark., 1.

French *vs.* People, 6 Col. App., 311.

Swing *vs.* Brister, 87 Miss., 516.

Baker *vs.* Spaulding, 71 Vt., 169.

Galloway *vs.* Standard Fire Insce. Co., 45 W. Va., 237.

S. M. Smith Ins. Agency *vs.* Hamilton Fire Insc. Co., 69 W. Va., 129.

Davis *vs.* Aetna Mut. Fire Ins. Co., 67 N. H., 218.

Note to Johnson *vs.* Insce. Co., 63 L. R. A., 833.

1 May on Insurance, sec. 66.

Mutual Life Ins. Co. *vs.* Cohen, 179 U. S., 262.

See Also North Western, &c., Co. *vs.* McCue, 223 U. S., 234.

Liverpool, &c., Co. *vs.* Phenix Ins. Co., 129 U. S., 397.

3 Page on Contracts, sec. 1718.

Richards on Insurance, sec. 92.

It cannot be doubted that the declaration recognized the contracts as completed and effective on April 8, 1912, thus necessarily effected in the State of Pennsylvania, and this is further manifested by the provision of the policies that they were to become effective when countersigned by the company's agent at Philadelphia, which was done there on that date. But other considerations forbid the conclusion that the contracts were Florida contracts. Regarded as Florida contracts they were effected in direct violation of the laws of Florida, and continued provisions forbidden by the laws of Florida. In determining the proper law of contract, the effort is to ascertain by what law the parties intended to bind themselves. If the intention of the parties is directly expressed it is controlling in all ordinary cases, but, if unexpressed, there is a presumption that the *lex loci contractus* controls; and there is a further presumption, which common sense itself suggests, that parties will not be presumed to have contracted with reference to a law which would make their contracts illegal in whole or in part, if they are equally referable to a law that would sustain them in their entirety.

Pritchard *vs.* Norton, 106 U. S., 124.
Gibson *vs.* Conn. Fire Ins. Co., 77 Fed., 561.
*Re* Missouri Steamship Co., L. R. (1889), 42 Ch. Div., 321.

The intrinsic evidence in the policies themselves conclusively shows an intention not to contract with reference to the law of Florida, first, by the provision declaring they were to become effective in Pennsylvania, and, second, by the clauses to which attention has already been called.

And in considering the force of these provisions, it is to be borne in mind that the policies purport to be in the standard form of the States of Connecticut, New York, New Jersey, Rhode Island, and North Carolina, so that in reality they are not in the language of the Insurance Company's

choice; and much more so are they not properly referable to the law of Florida, where material provisions in the standard form are invalid. It is attempted to import a different law to defeat the terms of the policies, because the entire controversy in this case is conclusively settled by the language of the policies themselves, in the provision that "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," and in the further provision respecting non-waiver, if these provisions are regarded.

Aetna Life Ins. Co. *vs.* Moore, 231 U. S., 543.
Northern Assur. Co. *vs.* Grand View, &c., Assn., 183 U. S., 308.
Penman *vs.* St. Paul, &c., Ins. Co., 216 U. S., 311.
Lumber Underwriters *vs.* Rife, 237 U. S., 605.

It is impossible *to assume* an intention on the part of the Insurance Company to contract under the law of a State in which it was not authorized to do business, when the policies were issued and became effective at its home office in Pennsylvania, and especially when the policies in material provisions were not effective under the foreign law, to which it could have no intention of subjecting itself. The pleadings in this case admit that the Insurance Company was not doing business in Florida, unless it could be held as a matter of law that the issuing of policies and renewals on this particular property constituted the doing of such business, contrary to what this court said in Allgeyer *vs.* Louisiana, 165 U. S., text 592; and the situation is entirely different from that disclosed in the case of Pennsylvania, &c., Ins. Co. *vs.* Meyer, 197 U. S., 407, where for the purpose of jurisdiction it was held that a Pennsylvania company was doing business in New York, where it had resident directors and nearly one-third of the total amount of its risks, although in that case it was conceded that the contract was a Pennsylvania con-

tract. It is generally held that isolated transactions do not constitute the doing of business in such cases.

Frawley *vs.* Pennsylvania Casualty Co., 124 Fed., 259.

Romaine *vs.* Union Ins. Co., 55 Fed., 751.

Hazeltine *vs.* Ins. Co., 55 Fed., 743.

Marine Ins. Co., *vs.* St. Louis, &c., R. Co., 41 Fed., 643.

Cooper Mfg. Co. *vs.* Ferguson, 113 U. S., 727.

Grant *vs.* Anderson, L. R. (1892) 1 Q. B., 108.

O Kura *vs.* Forsbackon, &c., L. R. (1914) 1 K. B., 715.

See also Hunter *vs.* Mutual Reserve, &c., Co., 218 U. S., 573.

Provident, &c., Socy. *vs.* Kentucky, 239 U. S., 103.

19 Cyc., 1268.

The opinion of the majority in the Supreme Court of Florida states the well-recognized rule of common-law pleading, that where a pleading on its face has two intendments it must be construed most strongly against the pleader. And having regard to that rule it was singularly inconsistent to deny, as the court did (Record, p. 70), that the policies were declared upon as effected in the State of Pennsylvania.

B.

Having thus seen that the policies were Pennsylvania contracts, it remains to be considered whether or not the Florida courts could apply thereto the provisions of section 2765 of the General Statutes of Florida, consistently with the provisions of the Federal Constitution. We do not refer specially to section 2777 because it has no real bearing on the facts disclosed by the pleadings, and in any event the question is the same.

Section 2765 of the General Statutes, in its original form, was section 7 of chapter 1863, Acts of 1872, entitled "An Act Relating to Insurance Companies," which in general was of similar import to the present statutory provisions already quoted. In its original form this section read as follows:

> "Any person or firm in this State who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them as agent or agents of such company, or who in anywise directly or indirectly makes or causes to be made any contract or contracts of insurance for or on account of such insurance company, shall be deemed to all intents and purposes an agent or agents of such company, *and shall be subject and liable to all provisions, regulations and penalties of this chapter.*"

The only material change is the elimination of the last clause, italicised above, in the present statute; and it is perfectly plain that the statute, as originally enacted, was never intented to deal with the relations of the parties named therein, as regards their authority to bind their principals, but, as said by the Supreme Judicial Court of Massachusetts of a similar statute, "only to declare that certain classes of persons should be deemed to be so far agents of insurance companies as to be liable to the penalty prescribed."

Harrison *vs.* City Fire Ins. Co., 9 Allen, 231.
Markey *vs.* Mut. Ben. Ins. Co., 103 Mass., 78.
Wood *vs.* Firemen's Ins. Co., 126 Mass., 316.

That the statute in its present form was not intended to raise special agents with limited authority into general ones

with unlimited authority has been expressly decided by this court.

Mutual L. Ins. Co. *vs.* Hilton-Green, 241 U. S., 613.

But the Supreme Court of Florida in this case has placed a different construction upon the statute, which, so far as this court is concerned, it had power to do, provided it did not cause the statute to thereby encounter the Constitution of the United States and the laws of the United States made in pursuance thereof, as to which under article VI of the Federal Constitution "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Before proceeding further it may be well to analyze briefly the opinion of the majority of the Florida court, to see exactly what was held.

The opinion is incoherent, and it is not easy to discern any consistent line of argument relied upon for its support. It admits at the outset that the Florida statute could not operate outside the borders of Florida, and states that the question to be determined was whether or not the contracts of insurance must be held to be Florida or Pennsylvania contracts. It then states that the Insurance Company was amenable to the Florida laws, whether it had secured a permit to do business in Florida or not, if as a matter of fact it voluntarily engaged in business in Florida. It further states that although Lowry & Prince were acting as brokers for the Manufacturing Company it might also be true that they acted in a dual capacity, and by virtue of what was actually done by them the law could also hold them to be agents of the Insurance Company. It further states that the property insured was in Florida, that the policies were delivered to the Manufacturing Company in Florida by Lowry & Prince, who were not only acting as brokers for the Manufacturing Company, but also as agents for the Insurance Company; that the policies were and are Florida contracts,

and that by reason of the transactions had with Lowry & Prince, they being allowed the usual brokers' commission, the Insurance Company was doing business in Florida, and Lowry & Prince were its agents, which was confirmed by the fact that the Insurance Company requested information of them as to the subject-matter insured. From all of this it concluded that the laws of Pennsylvania had nothing to do with the transaction, and that Lowry & Prince, under the Florida statutes, were the agents to all intents and purposes of the Insurance Company. It further asserts that the court should not make a discrimination in favor of a foreign insurance company attempting to do business in Florida without complying with the statutory requirements.

In answer to the petition for rehearing the ground of decision is stated in the following language:

> "In the rejoinder facts are alleged that the court holds to be sufficient to make Lowry & Prince the agents of the insurance company under the statute *and that such agency makes the policy subject to the jurisdiction of this State.*" (Record, p. 71.)

To sum up the whole matter, the opinion asserts that a Pennsylvania company, authorized by the law of Pennsylvania to issue policies on property in Florida, by issuing policies in Pennsylvania on property in Florida at the solicitation of brokers in Florida representing the insured, by requesting information from them as to the property insured, and allowing them the usual brokers' commission, was doing business in Florida and amenable to the laws of Florida, whereby the brokers were to an unlimited extent the agents of the Insurance Company, even although the policies issued in Pennsylvania expressly provided that no person not duly authorized in writing should be deemed an agent of the Insurance Company. We have already shown that the application of the Florida statute cannot rest upon the theory that the State of Florida could annex such con-

ditions as it saw fit to the right of a foreign corporation to do business in Florida, because the statute by its terms equally embraces individuals and firms; hence the conclusion of the court must necessarily rest upon the assertion that the State of Florida had power to directly affect by its legislation contracts effected in a foreign State, insuring property in Florida, either by reason of that fact alone, or by reason of the fact that the policies were solicited by an agent *of the insured* resident in Florida, who was allowed a broker's commission, and who furnished information regarding the property insured.

And this assertion, in its last analysis, is that Florida legislation can directly affect contracts entered into in Pennsylvania, pursuant to the laws of Pennsylvania, by a corporation of the State of Pennsylvania, which is precisely what the court was bound to admit, and did admit, Florida legislation could not do. Of necessity, the laws of one State can neither condition nor qualify the obligation of contracts entered into in another State, sanctioned by the laws of the latter State, as against one not subject to the laws of the former State.

New York Life Insurance Co. *vs.* Head, 234 U. S., 149.
Allgeyer *vs.* Louisiana, 165 U. S., 578.
Royal Arcanum *vs.* Green, 237 U. S., 531.
Hartford L. Ins. Co. *vs.* Barber, decided Nov. 19, 1917.
Mut. L. Ins. Co. *vs.* Cohen, 179 U. S., 262.
Nutting *vs.* Massachusetts, 183 U. S., 553.
Delameter *vs.* S. Dakota, 205 U. S., 93.
See also Jeffreys *vs.* Boosey, 4 H. L. R., text 926.
MacLeod *vs.* Atty. Gen., L. R. (1891), App. Cases, 455.

N. Y. Life Ins. Co. v. Dodge, 246 Ill. 357.

In the case of Old Wayne, &c., Assce. Co. *vs.* McDonough, 204 U. S., 8, this court held that a Pennsylvania *statute*

could not make the insurance commissioner of Pennsylvania agent of an Indiana corporation in respect to a policy effected in Indiana.

See also Simon *vs.* So. Ry. Co., 236 U. S., 115.
Riverside, &c., Mills *vs.* Menefee, 237 U. S., 189.
Hunter *vs.* Insce. Co., 218 U. S., 573.
Pennsylvania, &c., Co. *vs.* Min. Co., 243 U. S., 93.

On general principles, the owner of property in Florida could insure it in Pennsylvania, at the home office of the company there, and thus effect a contract to be controlled by the law of Pennsylvania, even if the insurance company were doing some business in Florida, and authorized to do business there. In Old Wayne, &c., Assce. Co. *vs.* McDonough, *supra*, a citizen of Pennsylvania effected a contract of insurance in Indiana with an Indiana corporation, which was also doing business in Pennsylvania, yet this court held that the Pennsylvania statute which designated the insurance commissioner of Pennsylvania as an agent upon whom service could be had so as to bind the company did not apply to the transaction effected in Indiana, and reversed the judgment of the Supreme Court of Indiana upholding a recovery upon a judgment based upon such service.

With two exceptions, hereinafter mentioned, all the cases cited in the majority opinion in support of its conclusion that Lowry & Prince were agents of the Insurance Company, belong to two classes. One class is exemplified by cases like Swing *vs.* Munson, 191 Pa., 582, and Rose *vs.* Kimberly, 89 Wis., 545, which *deny* recovery by the insurer on assessment policies in cases of this character, on the theory that such contracts are opposed to the policy of the insurance laws in the States where they are sought to be enforced. And it is remarkable that such cases, *denying* recovery, are cited to *support* recovery. The other class is exemplified by John R. Davis Lumber Company *vs.* Insce. Co., 95 Wis., 226, and Welch *vs.* Insce. Co., 120 Wis., 456, which hold

that a foreign insurance company doing business in a State through authorized agents is subject, as to such business, to the laws of the State. Obviously such cases have no bearing on the question here involved.

The exceptions are Stanhilber *vs.* Insce. Co., 76 Wis., 285, decided by the Supreme Court of Wisconsin in 1890, and Fred Miller Brewing Co. *vs.* Insce. Co., 95 Iowa, 31, decided by the Supreme Court of Iowa in 1895. In the former case the court places the decision upon the ground that * * * "A contract insuring property in this State necessarily involves the doing of business in this State, and hence is subject to the laws of this State." In the latter case the ground of decision is the same, and both these cases are necessarily overruled by Allgeyer *vs.* Louisiana, decided by this court in 1897, in which the court reversed a decision of the Supreme Court of Louisiana based upon the same proposition. This court said:

> "The Atlantic Mutual Insurance Company of New York has done no business within the State of Louisiana and has not subjected itself to any of the provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, *even if that property were in the State of Louisiana*, and correlatively the citizens of Louisiana had the right without the State of entering into a contract with an insurance company for the same purpose. Any act of the State legislature which should prevent the entering into such a contract * * * is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."
>
> 165 U. S., text 592.

The majority opinion entirely misconceives the cases of Hooper *vs.* California, 155 U. S., 648, Allgeyer *vs.* Louisi-

ana, *supra*, and Nutting *vs.* Massachusetts, *supra*. The distinction it fails to observe is fundamental. It depends upon the proposition that a State has power to legislate concerning business carried on within the State by an agent within the State, but has no power to legislate concerning business transacted outside the State through contracts effected outside the State, as against one not subject to its jurisdiction.

See also Assce. Socy. *vs.* Kentucky, 239 U. S., 103.
French *vs.* People, 40 Pac., 463.
Swing *vs.* Brister, 87 Miss., 516.
Swing *vs.* Hill, 165 Ind., 411.
Insce. Co. *vs.* Hilton, 58 N. Y. Supp., 996.
Stone *vs.* Penn Yan, &c., R. Co., 197 N. Y., 279.
Stone *vs.* Old Colony St. R. Co., 212 Mass., 459.
Swing *vs.* Taylor, 68 W. Va., 621.

In other words, and in the last analysis, the Pennsylvania corporation could not be subject to the laws of Florida so long as it remained at its domicile in Pennsylvania, and it was impossible for the court to rightly determine, on demurrer to the rejoinder, which admitted the truth of all facts set forth in the rejoinder, that as a matter of law, in doing what the Insurance Company did in the State of Pennsylvania, it had left its domicile there and subjected itself to the laws of Florida.

There is no attempt to sustain the decision except by reference to the statute, which, as shown, could not be applicable. It is incidentally suggested that because the Insurance Company requested information of Lowry & Prince regarding the property insured that tended to make them the Insurance Company's agents, but the suggestion is puerile.

How otherwise was it to know what risk it was asked to assume? In furnishing such information they were agents

of the insured, and any statements they made bound the insured.

Hamblet *vs.* City Insce. Co., 36 Fed., 118.
II Mechem on Agency (2d ed.), sec. 2368.

And the fact that they were allowed the usual brokers' commission was equally immaterial.

United Firemen's Insce. Co. *vs.* Thomas, 92 Fed., 127.
Sharman *vs.* Cont. Insce. Co., 52 L. R. A. (N. S.), 670.
Seamans *vs.* Knapp, 89 Wis., 171.
Morris, &c., Co. *vs.* German F. Ins. Co., 126 L. A., 32.
Lycoming Fire Insce. Co. *vs.* Rubin, 79 Ill., 402.
Texas Fire Insce. Co. *vs.* Brown, 82 Tex., 631.
II Mechem on Agency (2d ed.), sec. 2368.

These suggestions, however, it is unnecessary to pursue, because they do not form the ground of the decision, which rests solely upon the application of the Florida statute to the Insurance Co., which never left its domicile in Pennsylvania so as to become subject to the law of Florida.

The judgment should be reversed.

Respectfully submitted.

JAMES F. GLEN,
*Counsel for Plaintiff in Error.*

## SUBJECT INDEX.



## LIST OF CASES.

# Supreme Court of the United States.

*October Term, 1918.*

No. 308.

AMERICAN FIRE INSURANCE COMPANY,
*Plaintiff in Error,*
*v.*
KING LUMBER AND MANUFACTURING COMPANY,
*Defendant in Error.*

*Motion to Dismiss the Writ of Error for Want of Jurisdiction and to Affirm the Decision of the Court Below.*

Comes now the defendant in error, the King Lumber and Manufacturing Company, by its attorneys, Benjamin Micou, John H. Treadwell and E. D. Treadwell, appearing in its behalf and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the accompanying brief.

It is further represented to the court that it is manifest that the writ of error was taken for delay only and it is moved that the decision of the Supreme Court of Florida be affirmed. Further it is represented that the case is of a character that does not justify extended argument and it is requested that the same be transferred to the Summary Docket.

BENJAMIN MICOU,
JOHN H. TREADWELL,
E. D. TREADWELL,
*Counsel for Defendant in Error.*

*Notice to Gustavus Remak, Jr., Esq., and to James F. Glenn, Esq., Counsel for the American Fire Insurance Company, Plaintiff in Error in the above cause.*

Please take notice that provided the case above referred to has not before Monday, the 28th of April, 1919, been called and either submitted or argued that on that date, at the opening of the Court or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for a decision of the court thereon.

Attached hereto is a copy of the motion and the brief to be submitted in support thereof.

BENJAMIN MICOU,
*Counsel for Defendant in Error.*

Affidavit as to service of notice of motion and brief through the mails in accordance with rule 6 of the Supreme Court of the United States is filed in this case.

IN THE

# Supreme Court of the United States.

*October Term, 1919.*

No. 308.

AMERICAN FIRE INSURANCE COMPANY, a Corporation,
*Plaintiff in Error,*
*v.*
KING LUMBER AND MANUFACTURING COMPANY,
a Corporation,
*Defendant in Error.*

## *BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS FOR WANT OF JURISDICTION.*

### STATEMENT OF THE CASE.

The case comes here by writ of error from the Supreme Court of Florida. The suit was brought by defendant in error against plaintiff in error to recover for losses sustained by fire covered by two policies of insurance. The judgment of the Circuit Court of Florida was on demurrer and in favor of defendant in error here for $2,916.10 for its damages together with the further sum of $300 for reasonable attorney's fee and also its costs (p. 34, rec.). The plaintiff in error in this court and the defendant in error were respectively plaintiff in error and defendant in error in the Supreme Court of Florida and henceforth for brevity we will refer to them as plaintiff and defendant respectively.

The case as presented by the pleadings is that the plaintiff, a Pennsylvania corporation, issued two policies of fire insurance to defendant, a Florida corporation, through Lowery & Prince of Tampa, Florida, on property in Florida, and through said Lowery & Prince received the premiums on the policies. After loss occurred and it was sued on said policies by defendant here, it claimed that the policies were executed in Pennsylvania; that it was not engaged in the transaction of business in Florida; that it had no agent or representative there but that the policies were secured in Florida by defendant through Lowery & Prince of Tampa, Florida, as brokers of defendant. The policies each contained the following provision.

> "Warranted same gross rate, terms and conditions as and to follow the American Central Insurance Company, of St. Louis, Mo., and that said company has throughout the whole time of this policy, at least $5,000.00 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void."

Plaintiff also claimed that without its knowledge, the American Central Insurance Company of St. Louis, Mo., had cancelled its policies prior to the loss and at the time of the loss carried no insurance on the property.

Plaintiff admitted the allowance of a policy by it on the property of the defendant in Florida in April, 1908, and that it continued to write and issue policies on this property including those sued upon, upon the written request of Lowery & Prince as brokers of defendant. Plaintiff by rejoinder further averred that Lowery & Prince transmitted to it at its main office in

Philadelphia the original and subsequent applications for insurance upon defendant's property; received by mail the policies for defendant and transmitted by mail for it the amount of the premium less the usual broker's commission. It then denied that by issuing the policies or otherwise it was engaged in the transaction of business in Florida and that it paid to Lowery & Prince for plaintiff any premiums on the policies written by plaintiff and that Lowery & Prince were agents of plaintiff and denied that it advised or consulted with Lowery & Prince as to the advisability of the risk or otherwise, except to the extent that it did request information from them as to the subject matter insured and the companies carrying insurance thereon.

Defendant denied that at the time the policies went into force and were executed and delivered that the plaintiff was not engaged in the transaction of business in the State of Florida and alleged that at that time and as far back as 1908 that plaintiff was transacting business in Florida and with defendant and that on April 14, 1908, it, through Lowery & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of defendant's property described in policies it sued on and that said policy so written was from time to time renewed and kept in force and additional insurance written on said property, and finally, in 1912, the policies herein sued on were written and plaintiff before accepting the risk provided for by the first policy written in 1908 consulted with the said Lowery & Prince as to the nature of the risk assumed, and from time to time, from then to the date of the fire, consulted and advised with Lowery & Prince as to the physical condition of defendant's property and as to the advisability of assuming a risk thereon and relied

upon the said Lowery & Prince for its information on this subject; that the said Lowery & Prince caused plaintiff to write the policy of 1908, procured it to renew said policy from time to time and to finally write and issue the policies here sued on, and that defendant from 1908 to the date of the policies here sued on paid to the said Lowery & Prince premiums charged by the plaintiff for said policies and said premiums were forwarded by the said Lowery & Prince less their commission, which commission was allowed by plaintiff, and at the time the policies sued on herein were delivered to defendant it paid the premium charged by plaintiff therefor to Lowery & Prince who forwarded said premium to plaintiff. Defendant denied that plaintiff at the time of the execution and delivery of the policy sued on had no agent or representative in Florida but stated the fact to be that Lowery & Prince, who procured and caused said policies to be written, who collected the premiums and who forwarded the same to the plaintiff were agents of the plaintiff.

Defendant admitted that the two policies sued on contained the warranty quoted above and states that Lowery & Prince, the agent of plaintiffs in error when they delivered to it the policy sued on, called its attention to said warranty clause and stated to it that said clause would not affect defendant and should be disregarded by it, giving as their reason that defendant had at the time in the American Central Insurance Company of St. Louis, $6,500 of insurance covering the items insured by the policies sued on herein.

That at this time the plaintiff was carrying a large amount of insurance, approximately $45,000, in various companies and did not keep up very closely with the amount of the insurance in any particular com-

pany, being careful only to keep the total amount approximately $45,000 in reputable old line companies, and that it therefore relied upon the representation of said Lowery & Prince, who stated that they had investigated the policies of defendant in the said American Central Insurance Company of St. Louis, and that repliant had $6,500 of insurance as aforesaid. Further that relying upon the representation of Lowery & Prince, agents of the plaintiff, and upon their instruction to disregard said warranty that defendant accepted said policies and paid the said Lowery & Prince the premium therefor charged by the plaintiff. Further that some time prior to July 25, 1912, Lowery & Prince as agents of plaintiff notified defendant that the American Central Insurance Company was desirous of cancelling its policy No. 303149 for $1,500 and suggested to defendant that there be substituted for this policy one in a like sum in the Peoples National Fire Insurance Company of Philadelphia. That this information coming from said Lowery & Prince, agents of the plaintiff, and this suggestion having been made by said agents, defendant agreed to the cancellation of said policy and the substitution of a policy with the Peoples National Insurance Company of Philadelphia. Further that some time prior to October 27, 1912, said Lowery & Prince, agents of plaintiff, notified defendant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy No. 303192 in the sum of $1,500 and suggested that there be substituted therefor a policy in a like amount in the American Union of Philadelphia. That this information and suggestion being given by the agents of plaintiff as aforesaid, defendant agreed that said last mentioned

policy be cancelled and said policy in the American Union of Philadelphia be substituted therefor. Further that said Lowery & Prince, agents of plaintiff as aforesaid, assured defendant that the cancellation of the policies above mentioned was not a violation of the warranty set forth in the policy sued on provided a like amount of insurance was carried in some other old line insurance company. Further, that as soon as said policies were cancelled new policies were substituted in pursuance of the suggestion above in the companies above mentioned. And therefore defendant denied that said policies were cancelled without the knowledge of plaintiff, but averred that said policies were cancelled with the full knowledge and consent and at the suggestion of Lowery & Prince, who were the agents of plaintiff acting for it in the State of Florida, who as such agents had caused the policies sued on to be issued, had collected the premiums paid by defendant for said policies, forwarded the same to plaintiff, and that plaintiff thereby waived said warranty clause and ratified and confirmed the cancellation of the said policies of insurance in the American Central Insurance Company of St. Louis, Mo. Defendant further denied that the policies of insurance sued on were delivered in Pennsylvania, but stated the fact to be that the same were delivered by Lowery & Prince, as agents for plaintiff, to defendant in Florida and accepted by defendant in said State (pp. 1–31, rec.).

Statement of the facts by the Supreme Court of Florida admitted to be correct (pp. 37 to 43, rec.). Opinion of the court (pp. 45 to 46, rec.).

The following are general statutes of Florida in effect at the time of the transaction in question:

"2765. Agents.—Any person or firm in this

State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

"2777. Who agent of company.—Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

In plaintiff's brief, pp. 8 to 15, are set out the above sections and other sections regulating the transaction of business by foreign insurance companies in Florida.

The two sections we quote though, are the only ones bearing directly on this case or which were referred to by the Supreme Court of Florida.

The assignments of error on appeal to the Supreme Court of Florida, one to five, inclusive, pp. 35 to 36, rec., were relied upon as presenting a Federal question which it is claimed was so decided by the Supreme Court of Florida as to give this court jurisdiction of the case. Remaining assignments of error on appeal to the Supreme Court of Florida 6 to 11, p. 36, rec., are directed to the merits of the case.

We refer in our brief to the assignments of error to the Supreme Court of Florida rather than to the assignments of error to this court because to determine whether that court decided a question that would give this court jurisdiction it is necessary to know what was before the Supreme Court of Florida. Further there is a variance in the language used between the assignments of error to the Supreme Court of Florida, pp. 35 to 36, rec., and the assignments of error to this court, p. 73, rec.

The assignments of error to this court, six in number, are none of them stated in the identical form of any of the assignments to the Supreme Court of Florida. The sixth assignment here alleges that the construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida violated Sec. 10, Art. I of the Constitution of the United States. There was no assignment of error before the Supreme Court of Florida directed to raising a question of any violation of Sec. 10, Art. I, of the Constitution.

Further we respectfully submit that a careful reading of the six assignments of error to this court, p. 73, rec., will show that plaintiff has made no assignments of error here that go to the merits of his case but only assignments that go to the jurisdiction of this court.

## This Court Has No Jurisdiction.

The first five assignments of error to the Supreme Court of Florida, pp. 35 to 36, rec., suggest that the Circuit Court of Florida by holding that Sec. 2765 of the General Statutes of Florida applied to the contracts of insurance sued on and which plaintiff assumed were made in the State of Pennsylvania, denied.

First, full faith and credit to the laws of Pennsylvania in violation of Sec. 1, Art. IV, of the Constitution of the United States. 1st assignment, p. 35, rec.

Second, violated the following provisions of the 14th amendment to the Constitution of the United States, i. e.,

1. That no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. 2d assignment, p. 36, rec.

2. Nor shall any State deprive any person of life, liberty or property without due process of law. 3d assignment, p. 36, rec.; and that

3. No State shall deny to any person within its jurisdiction the equal protection of the laws. 4th assignment, p. 36, rec.

Further, by its fifth assignment, that the court below, by holding that Sec. 2765 applied to the contracts sued on, etc., and made in Pennsylvania, denied to plaintiff the benefit of Art. IV of the Constitution of the United States which provides that "the judges of the United States shall be bound thereby by anything in the Constitution of the United States or laws of any State to the contrary notwithstanding."

The Supreme Court of Florida by holding Sec. 2765 of the General Statutes of the State valid and applicable to the contracts sued upon did not draw in question the validity of the statute of any State on the ground of its being repugnant to the Constitution of the United States or violative of any amendment to the Constitution, a thing it would have had to have done before this court would acquire jurisdiction.

The court based its decision on the contracts sued on on the ground that they were made in Florida through

Lowery & Prince and that Lowery & Prince were agents of plaintiff and the court refused to give Section 2765 extra territorial effect, pp. 52 to 53, rec. At the outset the court said:

> "As we read the pleadings in the instant case and the respective orders made thereon, which form the basis for the assignments now under consideration, we fail to find where any such orders had the effect of giving extra territorial effect to either section 2765 or 2777 of the General Statutes of 1906 or extending their operation into the State of Pennsylvania, as the defendant contends. The pleadings show that the property upon which the two policies were issued was situated in Florida and that such policies were delivered to the plaintiff in Florida by Lowery & Prince, who were not only acting as insurance brokers for the plaintiff in the transaction but also as agents for the defendant. In other words, we are of the opinion, and so hold, that the two policies of insurance were and are Florida contracts and that by reason of the transactions had by the defendant with Lowery & Prince and what was done by and through them, the defendant paying them 'the usual broker's commission' for effecting such insurance, the defendant was doing business in Florida, and that Lowery & Prince were the defendant's agents, within the provisions of Section 2765 and 2777 as was held by the Circuit Court" (p. 52, rec.).

The Florida Supreme Court could hardly have stated more explicitly the grounds for its decision.

It is too well settled by this court to require citation of authorities that where the highest court of a State does not pass upon a federal question even though properly raised, this court does not acquire jurisdiction unless there was no way the court could have made

its decision without passing upon the federal question. That was not the case here. It was not necessary for the Supreme Court of Florida in deciding this suit to pass upon a federal question not even presented to it, save on the assumption, not admitted by the court, that the contracts sued on were made in Pennsylvania.

We would say though that if the Supreme Court of Florida, in sustaining the validity of Section 2765 or of 2777 and holding that Lowery & Prince were agents for the plaintiff in making the contracts sued on, had also held that the contracts were made in Pennsylvania, such a holding would in no wise have denied full faith and credit to the laws of Pennsylvania or have violated any provisions of the Constitution of the United States or amendments thereto. The Supreme Court of Pennsylvania has held that the issuance of a policy of fire insurance by a foreign insurance company upon properties situated in a State other than that of its creation is doing business in the State where the property insured is and the insuring company is bound by the laws of that State.

*Swain* v. *Munson*, 191 Pennsylvania, 582.

We will quote from the above case in our brief on the merits and also cite other authorities which bear out the view before stated.

The writ should be dismissed for want of jurisdiction here and the decision of the Supreme Court of Florida should be affirmed.

## BRIEF AND ARGUMENT ON MERITS.

Throughout the Record runs the idea that plaintiff was ready and willing to do business in Florida to receive the benefits therefrom but to incur no liabilities. That foreign corporations should undertake to do

in Florida what was here attempted justifies the wisdom of the Florida legislature in enacting Sec. 2765, providing that any one receiving or receipting for money on or for any contract of insurance to be transmitted to an insurance company for a policy of insurance or renewal of a policy shall be deemed *to all intents and purposes* an agent of said company.

Those who stand ready and willing to issue fire insurance policies in Florida after an examination of the property to be insured and recommendation as to the risk, moral and otherwise, by persons resident there and qualified to pass on these questions, and then if they approved the risk to accept from the hands of such persons the business they secure for them, should not be allowed after a loss occurs to hide behind the subterfuge here invoked and say in effect to the insured, "A" of Florida was kind enough to suggest your property for insurance by us, examine its condition and surroundings, report to us the character of risk it involved and the moral risk we would run by granting you insurance, and after we acted on "A's" report and recommendation and approved the same, was kind enough to see to collecting the premiums from you and transmitting the same to us less a commission agreed on between "A" and ourselves, but we, of course, knew all along this was nothing but "camouflage," whereby we got our premiums but upon a loss occurring escaped liability because this kind person who for the consideration we paid him attended to these matters for us was never our agent.

Owing to the fact that plaintiff bases his defence on the assumption that the transaction out of which this suit arose did not occur in Florida, it becomes necessary at times in discussing the case on its merits

to touch on matters incident to the first five assignments of error to the Supreme Court of Florida which have hitherto only been considered as bearing on the jurisdiction of this court. Further, owing to the fact already alluded to that the assignments of error to this court, p. 73, rec., seem to go only to the jurisdiction of this court and not to the merits of the case we will be obliged in this discussion to follow the assignments of error on the merits to the Supreme Court of Florida, 6 to 10, respectively, p. 36, rec.

PLAINTIFF WAS TRANSACTING BUSINESS IN FLORIDA.

The fundamental error of counsel for plaintiff is the assumption that the transaction of issuing the policies of insurance sued on occurred entirely beyond the State of Florida.

We admit the statutes of Florida can have no extra territorial jurisdiction and that the cases cited by counsel for plaintiff to establish that fact, support his contention. Counsel in the Supreme Court of Florida quoted from an opinion from Chief Justice White:

> "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State, and in the State of New York, and there destroy freedom of contract without throwing down the constitutional barrier by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the constitution depends."

There can be no gainsaying the law as laid down by the Chief Justice nor do the exigencies of the case so require. The quotation is entirely in our favor, for with the same force of reasoning it is equally true that it would be impossible to permit the statutes of

Pennsylvania to operate beyond the jurisdiction of that State and in the State of Florida, and thereby destroy the effect of the laws of Florida applicable to a fire insurance company of another State who transacted business in Florida.

> "If a foreign corporation transacts business in a State other than that of its incorporation, it is bound by the laws of the State where the business is transacted."
>
> *Orient Insurance Company* v. *Daggs*, Vol. 19, Supreme Court Reports of the United States, page 281. 33 S. W. Reporter 992. 19 Cyc. of Law and Procedure, pages 1220 and 1221.

The last authority cited states the law as follows:

> "A corporation can claim no right to do business in another State, except subject to the conditions imposed by its laws. It has been well said that a corporation which seeks by its agents to establish a domicile of business in a State other than that of its creation, must take the domicile as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. It becomes amenable to the laws of the latter State and to the processes of its court upon the same principal and to the same extent as natural persons or domestic corporations."

See also *Insurance Company* v. *Morse*, 20th Wallace, p. 458. New York Life Insurance Company.

See also the case of *New York Life Insurance Company* v. *Fannie Gravens*, from the Supreme Court of the United States, reported in Volume 20, p. 962, Supreme Court Reports, where it is held:

> "The interstate character of a contract of insurance made by a resident of one State with a

corporation of another State, does not give it immunity from the control of the State in which the insured resides, and in which the corporation does business, and where it is further held that:

"The business of insurance is not commerce, and a State's statute regulating contracts of insurance made between residents of that State and corporations of another State is not invalid as a regulation of interstate commerce."

Much depends upon whether or not the course of dealings carried on by plaintiff with defendant from 1908 to the date of the loss, during which time various policies of fire insurance were issued by plaintiff on property in Florida, was doing business within the State of Florida, because if the writing of policies of fire insurance by the plaintiff upon the defendant's property in Florida constituted doing business within the State, then by so carrying on said business plaintiff assented to and became answerable to the statutory laws of Florida, and was bound thereby.

*B. & O. R. R.* v. *Harris*, 12 Wallace, E. S. 65.
20th Law Edition 354.

*Chicago & N. W. R. R. Co.* v. *Whitton*, 13th Wallace U. S. 270 to 285.
20th Law Edition, 571 to 576.

Exparte Schollenberger, 96 U. S. Reports, 369 to 376.
24th Law Edition, 853 to 854.

This brings us squarely to whether the writing of these fire insurance policies by plaintiff on property in Florida constituted doing business in Florida.

Counsel for plaintiff relies on *Old Wayne Mutual Life Association* v. *Sarah McDonough, et al*, 204 U. S. p. 8, in support of his contention that the issuing of

an insurance policy by a foreign insurance company in a State other than that of its creation, does not constitute doing business within said State.

A mere reading of this decision will show that the case is not applicable and does not bear out the contention. First, because the facts were entirely different from the facts in the present case

The facts in the *McDonough* case were that a policy of life insurance was issued by an insurance company in Indiana, upon the life of a resident of the State of Pennsylvania which provided that unless suit was brought upon the policy in six months after the death of the insured, any claim thereunder would be barred. Under the laws of Pennsylvania a provision in an insurance policy of this nature was legal, but under the laws of Indiana, was void. The insured died in Pennsylvania. No suit was brought upon the policy until the expiration of six months, and when brought the plaintiff was confronted with the six months clause, and to evade the same, alleged in his declaration not only that the contract was an Indiana contract, but with special stress that the contract was entered into *at* Indianapolis.

For all known, and so far as the court deciding the case knew, the insured might have made a personal application for the policy in Indianapolis, have been examined there and the policy delivered to him there, and afterwards moved to Pennsylvania. There is nothing in the declaration in the *McDonough* case to show that the policy was received by the insured in Pennsylvania, that the insured was examined in Pennsylvania, or that he paid the premiums there, or that anything was done in Pennsylvania in connection with the issuance of the policy, its delivery or the collection

of the premiums thereon. On the contrary, the declaration by its allegation, precludes the idea that such was the case. The substance of the decision of the Supreme Court of the United States in the *McDonough* case is, that it recognized the principle that where a foreign corporation comes into a State other than that of its creation and transacts business there, that it accepts the laws of such State, and is bound thereby, but that this principle does not extend to all business transacted, no matter where, with a citizen of said State. In other words, as above stated, the policy of insurance might have been applied for in person in Indiana, the insured examined there, the policy delivered to him there, and the premiums paid there, and afterwards the insured moved to the State of Pennsylvania.

We submit that an entirely different case is made out by the pleadings in the case at bar. Here the pleadings show that the plaintiff was a corporation, organized to write fire insurance in various States of the Union, that that was the business for which it was created, and that in pursuance of the purpose for which created, it, from 1908 to the date of the loss, wrote policies of insurance upon property located in Florida, and that these policies were solicited by Lowery & Prince and that the premiums were collected by Lowery & Prince, and forwarded to plaintiff less the commissions allowed Lowery & Prince; that during the period when the said policies were being carried, that the plaintiff from time to time requested information from Lowery & Prince, the insurance agents at Tampa, as to the subject matter insured, and from time to time relied upon them in changing the Warranty Companies.

In the *McDonough* case there was nothing in the pleadings to show that the insurance company ever

transacted any business in the State of Pennsylvania, other than the bare fact that there was a policy of insurance written upon the life of a citizen of Pennsylvania. The allegations of the declaration were such as would indicate that the application was made and received in Indiana, and that the policy was executed and delivered there, and that the insured was examined there, and that the premiums were collected there. An entirely different state of facts from that shown by the pleadings in the case now being considered.

There is another clear distinction between the *McDonough* case and this case. The *McDonough* case was based upon a life insurance policy. The court can readily see that the circumstances surrounding the issuance of a life insurance policy are necessarily entirely different from those surrounding the issuance of a fire policy, and the considerations entering into the issuance of the two policies entirely different. In the issuance of a life policy there is mainly to be considered the condition of the health of the insured, his habits, his moral and financial standing, and other elements of fitness that pertain to those main considerations. These conditions might be examined into and decided upon by a life insurance company as well in one State as another, for they are solely matters of examination concerning and decision regarding a person. One could make an application for a life insurance policy in Florida to-day, be examined next week in Georgia and the policy issue to him the week after in New York, and the insured could then permanently locate in New Jersey, and, of course it could not be said that the insurance company was necessarily doing business in New Jersey, simply because a person on whom it had taken a risk had moved there.

The considerations entering into the issuance of a fire policy, deal almost entirely with local conditions. If the building to be insured is situated so many feet from some other building, one rate is effective. If it is closer another rate. If in a city with certain fire protection a different rate is effective than if in a town without that protection. If situated near a frame building or close to a railroad track, the rate is higher than if close to a brick building, away from a railroad track. The court knows that the slightest detail in connection with the location of a building in reference to other adjacent property, the class and use of the adjacent property, and the use of the property that is insured, makes all the difference in the world, first, as to whether the policy will be issued at all, and second, as to the amount of the premium.

The desirability of a fire risk from the moral standpoint of the insured could probably be ascertained without the company doing business in the State where the property is, but the building itself and its surroundings are in the nature of things controlling factors in the risk assumed. A fire insurance company could not intelligently ascertain whether it desired to insure property in Florida without having some one visit the property and ascertain for it the many details that enter into an assumption of the risk. This necessarily requires the sending into the State of some one to obtain these facts for it, or engaging some one already there to obtain them. A person resident in a community should naturally be more familiar with local conditions than a person sent from elsewhere.

The courts have uniformly held, without a single exception so far as we are able to find, that the issuance of a fire policy by a non-resident fire insurance

company constitutes doing business in the State where the property is, to the extent that in so issuing the said policy, the insurance company accepts the laws of the State where the property is located.

We particularly call attention to *Stanhibler, et al*, v. *The Mutual Mill Insurance Company*, 76 Wisc. 629, where the facts were that application for fire insurance was made in Chicago, to an Illinois corporation, and the premium was paid there and the loss was payable there. The property, however, was in Wisconsin, and the policy provided, or at least the application for the policy provided, that there was to be total concurrent insurance upon the property, including the policy in question of $40,000.00. The policy also contained a clause known as a three-fourths clause.

The statutes of Wisconsin provided, that in order for anything in the application for a fire insurance policy to be binding upon the insured, that a copy of the application must be attached to the policy, and further that whoever solicits insurance on behalf of any insurance corporation, or who makes any contract of insurance, shall be held an agent for such corporation to all intents and purposes.

The property insured in Wisconsin was burned. The insurance company refused to pay on the grounds, first, that the three-fourths clause had not been lived up to by the insured, and second, that the $40,000.00 concurrent insurance had not been carried, and at the date of the fire, there was only $25,000.00 concurrent insurance. The plaintiff replied that when this policy was issued, one Rudolph, who solicited the policy, and who effected the insurance, represented to the insured that the policy issued or to be issued upon said application did not and would not contain the three-fourths

clause. Further that the application for the insurance, which contained the obligation to carry the $40,000.00 insurance on the property, was not attached to the policy of insurance as required by the laws of Wisconsin. The insurance company contended that it was not bound by the action of Rudolph, because he was not their common law agent, or agent by contract, and the statute which provides that whoever solicts insurance on behalf of any insurance corporation should be held an agent of such corporation to all intents and purposes, did not apply to it, because it was a foreign corporation and that the policy of insurance was an Illinois contract, and executed and delivered in Illinois. It also contended that the statutes of Wisconsin requiring a copy of the application to be attached to the insurance policy, did not apply, because it was a nonresident, had never qualified to do business in Wisconsin, and was not bound by the laws of Wisconsin. In other words, the insurance company in the *Stanhibler* case, made identically the same defence as the plaintiff here makes.

The Supreme Court of Wisconsin in deciding the case used the following language:

> "It is conceded that at the time of issuing the policy the defendant company had no license to do business in this State. The broad contention is, that this contract of insurance is to all intents and purposes an Illinois Contract and that although it was for the insurance of property in Wisconsin, yet that it was binding upon the parties without the compliance with the statutes of this State, and regardless of their requirements. It is to be remembered that a contract against loss by fire, is a contract of indemnity. In fact, this is elementary, and needs no citation of authority, although it may relate to the loss of real title

property, yet it in no way attaches to or affects the title of such property. Foreign insurance companies are not compelled to do business in this State. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose. Citing 31 N. S. Reporter, p. 229.

In support of that proposition numerous decisions are cited in that case, not only from this court and courts of other States, but of the Supreme Court of the United States. As there indicated, the court has uniformly held that such State legislation does not pertain to matters of interstate commerce, nor the privileges or immunities of citizens in the several States, and this clause is therefore quoted from an opinion of the court by Mr. Justice Field:

> "They (the several States) may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."
>
> *Paul* v. *Virginia*, 8th Wallace, 181.
> *Ducat* v. *Chicago*, 10th Wallace, 410.
> *Insurance Company* v. *Mass.* ld. 566.
> *Association* v. *New York*, 119 U. S. 117.
> *Fritts* v. *Palmer*, 132 U. S. 281.

The court in deciding the *Stanhibler* case, also used the following language:

> *"A contract of insuring property in this State, necessarily involves the doing of business in this State, and hence is subject to the laws of this State. The location, amount, condition, preservation, care construction and value of such property, and the evi-*

*dence relating to the same are objects of local concern and business, and hence objects of local legislation.*

"We must hold that the trial court properly excluded from its consideration, as evidence, the application in question, by reason of the omission to attach a copy of the same to the policy, or to endorse it thereon.

The court further held that the insurance company was bound by the act of its statutory agent, in stating that the policy would not contain a three-fourths clause.

The *Stanhibler* case above referred to, 76 Wisc. 285, is on all fours with the case now being considered, and clearly decisive of the merits of the assignments of error, one to five. For these assignments are based solely on the idea that the business was transacted in Pennsylvania, not Florida, and that plaintiff was not answerable to the laws of Florida. See also *Rose* v. *Kimberly & Clark*, 89 Wisc. 545, where it is held that a contract by a foreign insurance company insuring property in the State of Wisconsin, necessarily involved doing business in said State.

See also *Pierce* v. *People*, 106 Ill., p. 11 and *Hacheny* v. *Leary*, 12 Oregon, p. 40.

See also *Swain* v. *Munson*, 191 Pa. 582.

We call court's attention to the fact that this decision is from the Supreme Court of Pennsylvania, to the protection of the laws of which State counsel for plaintiff so strenuously argues that plaintiff is entitled.

The facts in this case were that an insurance company organized under the laws of Ohio, wrote a fire insurance policy upon property in Pennsylvania and accepted notes of the owner of the property for premiums, etc. The insurance company had not complied

with the laws of Pennsylvania, claimed that it was not doing business in that State and that it had no agents there. The notes were not paid, and suit was brought upon the same in the Court of Pennsylvania. Defense was made on the grounds that the notes were void, because the insurance company had not complied with the laws of Pennsylvania. The insurance company replied that the policy of insurance was an Ohio contract, and that the notes were delivered to it in Ohio, and were therefore Ohio contracts, and that the laws of Pennsylvania could not affect the same. The Supreme Court of Pennsylvania, after stating that it was its opinion that the party who solicited this insurance was the agent of the insurance company, says:

> "But that we may meet a more important question, because it affects the interest of all foreign insurance companies that seek to do business in this State, we prefer to assume that the contract was made in Ohio and is lawful there. It was a contract, however, in direct violation of the laws of this State. It was the indemnification of the citizens of Pennsylvania against losses by fire on property wholly within Pennsylvania, without regard to where the contract was made, the subject of it was property within this State. It is the attempt of a foreign insurance company to do business in this State in violation of the laws of this State."
>
> *Swain* v. *Munson*, 191 Pa. 582.

So the Supreme Court of Pennsylvania has held that the issuance of a fire policy by a foreign insurance company upon property situated in the State other than that of its creation, is doing business in such State, and that in so doing is bound by the laws of such State; therefore, if you apply the laws of Pennsylvania to the case now being considered, as is so urgently demanded

by counsel for plaintiff, this court would have to hold that there is no merit in the assignment of errors, one to five, for the laws of Pennsylvania are not in derogation of any right claimed under the Constitution or its amendments.

See also *Seamans* v. *Temple*, 105 Mich. 400.

We also call the court's attention to the case of *Fred Miller Brewing Company* v. *Council Bluffs Insurance Company*, 95 Iowa, 349. The facts in this case were that one Winchester, a resident of Wisconsin, solicited fire insurance from the plaintiff. The plaintiff agreed to accept a policy in some fire insurance company from Winchester, not knowing what company Winchester intended to insure in. Winchester, by letter, submitted the application for the insurance to one Caldwell, an insurance broker of Chicago, Illinois. Thereupon he submitted the application to Marshall & Company of Chicago, Illinois, who were the agents of the defendant insurance company. Marshall & Company issued the policy sued on in the City of Chicago, and there delivered the same to Caldwell and charged it to Caldwell's account. Caldwell thereupon forwarded the policy to Winchester and the premium was collected by Winchester, his commission was deducted, and the balance was sent to Caldwell. Caldwell thereupon deducted his commission, and delivered the balance in the city of Chicago to Marshall & Company, agents for the insurance company. Afterwards there was a loss, and the insured brought suit in Wisconsin, and served Winchester with process, upon the theory that under the Statutes of Wisconsin as he had procured the policy to be written, he was an agent of the defendant insurance company. A judgment was rendered against the insurance company in

Wisconsin, and sent to Iowa to be there sued on, and suit was instituted in Iowa upon this judgment. It was contended by the defendant in the Iowa suit that the courts of Wisconsin never acquired jurisdiction and that therefore the judgment was void, that Winchester was not its agent, that it had never done business in Wisconsin, that it had no agents there and that the policy was executed and delivered in Illinois by its agent to a broker.

But the Supreme Court of Iowa in a clear, exhaustive and carefully reasoned opinion, upheld the Wisconsin judgment, and held further that Winchester was the agent of the insurance company, although the insurance company did not know him and had never heard of him; upon the theory that when the insurance company issued this policy upon property in the State of Wisconsin, it knew, or could have known, of the statute which made the party who solicited the insurance the agent of the insurance company, and that by so issuing said policy it accepted said statute, and was bound thereby. This case is conclusive as to whether or not plaintiff was doing business within the State of Florida, and as to whether or not Lowery & Prince were its agents.

The questions of law involved in consideration of that case were identical with those involved under sections 2765 and 2777 of the Statutes of Florida, in the disposition of the questions raised in assignments of error one to five, in the Supreme Court of Florida.

From the above authorities it is clear that when the plaintiff in 1908 issued a policy of insurance upon defendant's property in Florida, that it then and there became answerable to the Statutes of Florida, so far as the same applied to or affected this insurance. It

knew, or could have easily ascertained, and was charged with knowledge that sections 2765 and 2777 of the Statutes of Florida made Lowery & Prince its agents, and yet it continued to use Lowery & Prince to carry on its business in Florida from 1908 to 1912, and received all the benefits accruing from this business, and we submit it should not be permitted after liability stared it in the face to deny the agency of Lowery & Prince.

### Errors 6 and 7 Assigned to the Supreme Court of Florida.

It is contended under the above two assignments of error that the court below erred in sustaining defendant's demurrer to rejoinder of the plaintiff on the ground that the rejoinder was a complete answer to defendant's replications and on the further ground that the replications of defendant were bad and the judgment should have been rendered against it on that ground. Counsel for plaintiff first argued that the rejoinder was a complete answer to the replication because as a matter of law Lowery & Prince were not agents of plaintiff. We have already answered this contention fully under the preceding heading and will proceed here on the assumption that Lowery & Prince under the laws of Florida were the agents of the plaintiff.

As to the contention that the rejoinder is a complete answer to the replication it is clear that if it is the law that in writing fire insurance policies in Florida by a foreign corporation upon properties in Florida, constitutes doing business within the State, and that it is further the law that by so doing business the insurance company becomes answerable to the statutory laws of the State, that then the demurrer to the rejoinder

should have been sustained, because the rejoinder clearly admitted and showed the writing of the policies on Florida property by the plaintiff and that these policies were procured and caused to be written by Lowery & Prince, and such transaction was clearly covered by sections 2765 and 2777 of the General Statutes of Florida.

It is contended by counsel for plaintiff that the replication filed by defendant neither singularly nor as a whole answered the plea, and for that reason was bad.

This contention is without merit, as in plaintiff's first plea it is charged that plaintiff was not engaged in the transaction of business in Florida; that the policies were executed and delivered in Pennsylvania, and were secured through Lowery & Prince as brokers of defendant.

The first replication fairly and squarely met this by denying that plaintiff was not engaged in the transaction of business in Florida, and reciting facts to show that it was so engaged, which raised the question of law as to whether or not the said facts constituted doing business in Florida. This part of plaintiff's first plea was answered by a separate replication, because the same set up distinct matter of defense, and was in no way related to that portion of the first plea denying liability on the grounds of a breach of warranty.

The second replication also met the first plea. It admitted that the policy had attached thereto the warranty mentioned, but charged that at the time the policies were delivered that it was advised that it could disregard the same by Lowery & Prince, whom it alleged were the statutory agents of the plaintiff.

The third replication squarely answers all that portion of the first plea not answered by the first and

second replication, by likewise admitting that the policies sued on had attached thereto the warranty clause alleged, but charging that Lowery & Prince, whom it is alleged were the statutory agents of plaintiff, notified defendant that the American Central Insurance Company desired to cancel certain policies, and suggested that policies for a like amount should be written in other companies, and that in doing so the warranty referred to would be complied with. In other words, the plaintiff by its plea says that it was not liable because it was a non-resident; never had done any business in the State; had no agent in the State and second, because the policy contained a provision or warranty that was violated.

The first replication meets the first contention, and the second and third replication charges that the statutory agents of plaintiff advised defendant at the time the policies were delivered, that the warranty clause could be disregarded and afterwards actually made the change in the warranty companies, and advised defendant that such changes were not in violation of the warranty clause.

We submit that the replications were good and that the demurrer should have been sustained.

### Errors 8 to 11 Assigned to the Supreme Court of Florida.

The above referred to errors assigned that the court erred in holding that your defendant here could secure reformation of a policy sued on in a court of law in holding that Lowery & Prince had authority to abrogate the contracts represented in the policy sued on and make new and different contracts with the defendant and in holding that the defendant could recover in different causes of action from those set

up in its declaration and in sustaining the demurrer of the defendant to plaintiff's second plea.

These assignments can all be considered together.

Counsel for plaintiff contends that the remedy of defendant was in a Court of Equity to have the policies reformed and cites *Erickson* v. *Ins. Co.* 62 Fla. 161, and other authorities. The cases cited do not sustain the contention because the facts in those cases were entirely different from the facts set out in the replication and rejoinder in this case. In the *Erickson* case, the insured was without any insurable interest in the property, and there is a clear distinction between a waiver of the warranty clause in an insurance policy which is made for the benefit of the insured (which can be done) and the waiver of the necessity for the insured to have an insurable interest.

*Gibbs* v. *Richmond County Mutual Insurance Co.* 9 Daily N. Y. 203.

19 Cyc. of Law and Procedure, p. 777.

*Eagle Fire Insurance Company* v. *Lewallen*, 56 Fla., p. 246.

Counsel for plaintiff in error under assignments 6 and 7 before the Florida Supreme Court contended that an insurance company has a right to insert stipulations for its protection, and that a breach thereof avoids the policies, and cites numerous authorities. This contention is not sound; in that at most the breach of such a warranty as was attached to the policy sued on in this case would only make the policy voidable and not void.

*Eagle Fire Insurance Company* v. *Lewallen*, 56 Fla., p. 246.

But admitting for the sake of argument, that an abso-

lute breach would avoid the policy, still the authorities cited by counsel for plaintiff would not apply, because there never was a breach of the warranty clause. Before the American Central Insurance Companies' policies were cancelled, plaintiff, through Lowery & Prince, their statutory agents, waived the warranty clause in question.

Plaintiff contends that the warranty set up in defendant's plea was in the nature of a condition precedent, and therefore could not be waived. We submit that first the warranty was not a condition precedent, and second, even if it was, it could be waived like any other clause in an insurance policy made for the benefit of the insurance company. As to whether this alleged warranty was in the nature of a condition precedent, we first call attention to the clause itself, and to the fact that it is not a part of the written standard policy, but separate and distinct, pasted or stamped on the regular policy, also to the vague, uncertain and ambiguous way in which it is worded. From a careful reading of the clause though we assume the intention of the insurance company was to provide thereby that during the life of the policy, that the American Central Insurance Company of St. Louis should also carry at least $5,000.00 insurance on the same property insured by plaintiff, and that in the event of its not doing so, that then said policy issued by it should be null and void. This warranty could not be construed to be anything else than promissory. The plaintiff delivered the policy and said we will insure your property, but you must promise to keep a certain amount of other insurance in another company on it. The policy is delivered and thereby becomes effective, so it depends upon the future action of the insured as to whether

or not under the terms of the policy it is to remain in force. We submit that plaintiff itself, by its action, has construed the warranty under consideration to be a condition subsequent, and previously waived the condition. And here we call attention to plaintiff's rejoinder (pp. 31, 32, rec.), where it is admitted that from 1908 to the time of the writing of the policy sued on, plaintiff wrote various insurance policies covering defendant's property, including the policies sued upon, each of which contained a similar warranty clause, and that from time to time at the request of Lowery & Prince, the names of the companies were changed, as such companies designated cancelled their risks on the property, and where it is admitted that the American Central Insurance Company of St. Louis, Mo., was inserted in the warranty at the special request of Lowery & Prince.

We therefore submit that plaintiff's contention that the warranty clause in question was a condition precedent and could not be waived, is not only contrary to common sense and reason and to the plain meaning and intent of the warranty itself, but to the plaintiff's own construction placed upon the clause by several times waiving the same when from time to time at request of Lowery & Prince the names of the companies were changed.

If the terms of a written contract are in any way doubtful and if the construction placed upon the same by the action of the parties is reasonable, the construction as shown by such action of the parties will be accepted by the court.

*Webster* v. *Clark*, 34 Fla., p. 637, 653.
*Shouse* v. *Doane*, 39 Fla., p. 95.

Then again a condition precedent can be waived as

readily as a condition subsequent, and here we call attention to 19 Cyc., p. 777, where the following language is used.

> "When an insurance contract is conditioned to become void in case there be a breach of a condition precedent or subsequent, the true meaning is not that the instrument is upon a breach, thenceforth a nullity, and has no legal existence but only that upon the violation of the covenants by the insured that the insurer shall cease to be bound by his covenants. Inasmuch, therefore, as such conditions are inserted for the benefit of the insurer, they may all be waived by him, except when the insured by the act loses his insurable interests," citing decisions from the Supreme Court of Illinois, Iowa, Kansas, Missouri, Nebraska, Pennsylvania, Virginia, Wisconsin and the United States Supreme Court.

We do not, however, have to look beyond the decisions of Florida to settle the character and status of the clause and that it could be waived.

In *Tillis* v. *Liverpool, London and Globe Insurance Companies*, 46 Fla., p. 268, the court held: That the iron safe clause was a promissory one and could be waived by an agent. This clause provided for the keeping of books and taking of inventory, etc., and that failure to do so should render the policy void. In this case the court also held that the following provision in the policy that was being considered, that:

> "The use of the general terms or anything less than a distinct specific agreement clearly expressed and endorsed on the policy shall not be construed as a waiver."

might itself be waived.

In *Hartford Fire Insurance Company* v. *Redding*, 47

Fla., p. 228, the court held that the warranty against other insurance contained in the standard policies could be waived by an agent of the insurance company, and that this clause could be waived, even if the other insurance existed at the time of the issuance of the policy. In other words, the policy in the *Redding* case provided, in effect, that if there was then or should thereafter, be placed upon the property any other insurance without the written consent of the insurance company, that the policy should be void. The court held that if the agent of the company knew of the writing of the subsequent insurance or of the insurance already being upon the property, that it constituted a waiver. By the same reasoning we can not escape the conclusion that if the defendant had never had a policy in the American Central Insurance Company, or if it had had and permitted it to be cancelled, and that the agent of plaintiff knew that it had never had it or that it had permitted it to be cancelled, that that would constitute a waiver of this clause. Certainly a stipulation in a policy to the effect that there is no other insurance on the property, which stipulation is agreed to by the insured by the acceptance of the policy, is more in the nature of a condition precedent than a stipulation to the effect that the insured will thereafter carry certain additional insurance. To the same effect is the

*Eagle Fire Insurance Company* v. *Lewallen*, 56 Fla. 246.

This last case is clearly decisive of whether the warranty clause could be waived by the agent of the insurance company. The defense in the *Lewallen* case by the insurance company was also based upon a breach

of the warranty clause warranting against additional insurance. The insured admitted that he had obtained additional insurance, but claimed the clause against the same had been waived, by reason of the fact that he notified the agent of the insurance company of such additional insurance, and that the agent agreed to make the necessary endorsement, but failed to do so.

Now on principal there is absolutely no difference between the warranty set up here as a defense and the warranty claimed to have been violated in the *Lewallen* case. The purpose of each is identical, to wit: The protection of the insurance company. In the case here, by a warranty that the defendant should carry a certain additional insurance in order that if there was a fire others would bear their pro rata share of the loss. In the *Lewallen* case that the insured would not carry additional insurance, protection by strengthening the moral risk and taking away from the insured incentive to destroy the property. Insurance companies do not make their profits by paying losses, and for one and the same purpose have to provide against opposite contingencies under varied conditions. Many of these conditions are obtainable only through local sources. To employ those sources, use them and pay the source for that use as was done here, and then to deny the agency of the source used shows *at least* legal obliquity.

It is not necessary to go into a lengthy analysis of the *Lewallen* case, to show that it clearly settles the law in Florida on the question of the waiver by an agent of a warranty clause, such as was inserted in the policy sued on in this case.

It is contended by counsel for plaintiff that, admitting for the sake of argument that some agents could waive a clause of the kind under consideration, and that

Lowery & Prince were the agents for some purposes of the plaintiff, that still they were not such agents as could waive this clause, this brings the court to a construction of sections 2765 and 2777.

Now, we submit that if Section 2765 is binding at all upon the plaintiff by reason of it having done business in Florida, that it is binding with its entire force, and the section clearly states that whoever receipts for any money upon any contract of insurance or receives the same from any other person to be transmitted to any insurance company for any insurance policy or any renewal thereof, although such policy of insurance was not signed by the person receiving said money or receipting for same or transmitting the same, or who in anywise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of any insurance company, shall be deemed to all *intents and purposes* an agent or representative of such insurance company. The language "to all intents and purposes" can have no other meaning, and could have been used by the Legislature of Florida in the enactment of this law for no other purpose, than to make the person or persons who caused or procured this insurance policy to be written, and who receipted for money and transmitted the same, given for insurance policies, the agent of the insurance company for all purposes as fully as had the insurance company without the intermediary of such agency dealt with the insured. If it does not mean that, it does not mean anything, and was simply useless legislation.

And here we call attention again to *Stanhibler, et al*, v. *Mutual Mill Insurance Company*, 76 Wisc. 627. There is a statute in Wisconsin which reads:

"Whoever solicits insurance on behalf of any

> insurance corporation, or who makes any contract of insurance, shall be held an agent of such corporation, to all intents and purposes."

The insurance company in the case referred to had never qualified to write insurance in Wisconsin and had no office in said State. The application for the insurance was made and dated in Chicago, where the premium was paid. The person who caused the policy to be written was not a regular appointed agent of the insurance company, but in soliciting said insurance from the insurer, the solicitor stated to the insured that the policy would not contain and did not contain what is known as a three-fourths clause. The policy, however, did contain such a clause, and the same was not complied with by the insured. A fire occurred and the insurance company denied liability, by reason of the failure of the insured to comply with the said three-fourths clause; but the Supreme Court of Wisconsin applied the law above quoted to the person who solicited this insurance, and caused the policy there to be issued, and held that such person was the agent of the foreign insurance company, and had authority to waive the clause referred to.

It is a significant fact that that portion of the Florida statute with which we are particularly concerned, and the Wisconsin statute, are identical. That is, that portion of the statute which defines the kind of an agent a person is. The Wisconsin statute provides that a person who solicits insurance, etc., shall be held an agent of the insurance company, *to all intents and purposes*, the identical language used in the Florida statute. Therefore, if Lowery & Prince were the agents of the plaintiff at all, they were their agents *to all intents and purposes*, which language as construed

by the decisions above referred to by the Supreme Court of Wisconsin means that they are agents with power and authority, to waive any clause in the policy that the company itself could waive.

We also again respectfully call attention to the case of *Fred Miller Brewing Company* v. *Council Bluffs Insurance Company*, 95 Iowa, 349.

It is contended by counsel for plaintiff under assignments of error 8 and 10 to the Supreme Court of Florida that the action of the court in sustaining demurrer and entering judgment constituted a reformation of the policies sued on, and permitted defendant to recover a judgment on a different cause of action than that set forth in the declaration.

There is no merit in these two assignments. If the defendant had not had an insurable interest in the property, reformation in the policies covering the same might have been necessary and these assignments might have been good, but, as heretofore stated, there had never been a breach of the warranty clause depended upon by plaintiff but the clause was waived by plaintiff, and therefore was no part of the policy after the waiver. The contract as originally made had attached thereto a clause that was afterwards waived. When the suit was brought, it was brought upon the contract as modified by the waiver, and it was not necessary to allege in the declaration the waiver, as the clause waived was inserted for the benefit of the insured, and was a matter of defense, and when the same was pleaded defendant here, replied, setting up the waiver. Therefore, the warranty having been waived, there was no need for a reformation for there was nothing to reform, neither was there any departure. See *Indian River State Bank* v. *Hartford Fire Insurance Company*,

46 Fla. 243; *Hartford Fire Insurance Company* v. *Redding*, 47 Fla. 228, and *Eagle Fire Insurance Company* v. *Lewallen*, 56 Fla. 246.

The eleventh error assigned by plaintiff to the Supreme Court of Florida is predicated upon the order of the court sustaining demurrer to plaintiff's second plea. The second plea set up as a defense the existence of a mortgage at the time the policy was issued, which it claims that plaintiff did not know of. The plea is as follows:

> "And for a second and further plea the defendant says, that at the time of the execution and delivery of the policies sued on and each of them, and at the time said policies were expressed to go into effect, and at the time of plaintiff's loss, the entire property insured, including all of the personal property insured was subject to, and incumbered by the mortgage to W. G. Wells, set forth in plaintiff's proof of loss annexed to said declaration, on which there was due a large sum of money, the existence of which mortage was unknown to defendant until said proofs of loss were furnished it, *whereby the said policies* according to the terms thereof, became null and void," p. 21, rec.

The declaration and proof of loss attached thereto shows that there was included in the property insured which was lost by fire, real estate and fixed saw-mill and veneer machinery, which, of course, was likewise a part of the real estate.

The authorities all hold that where a mortgage is regarded merely as giving the mortgagee a lien, that the same is not a violation or breach of the condition that the insured's interests shall be an entire, sole, and unconditional ownership, 19 Cyc. p. 694. But counsel for plaintiff contends in his brief, that this

plea was divisable, but we submit no such construction can be placed on it. It is clearly interposed as an absolute defense to the entire action, as the concluding words of said plea are as follows:

> "Whereby the said policies, according to the terms thereof, became null and void."

And the court could do nothing else except sustain the demurrer to the plea, because it was so framed as to make it indivisable.

Counsel for plaintiff contends that the proof of loss shows that more than ninety per cent of the property that was lost was personal property. A mere reading of the proof of loss will show the error of this statement. Item 2 of the schedule was involved, which carried $8,500.00 on fixed and other machinery. Item 6 of the schedule carried $11,000.00 fixed and other machinery. Proof of loss attached to the declaration recites that the property destroyed that was insured under item 2 of the schedule was saw-mill machinery, and that the property destroyed covered by item 6 of the schedule was veneer mill machinery (pp. 5–13, rec.). Therefore, so far as the declaration and proof of loss is concerned, all the property that was destroyed by the fire might have been fixtures, and this was a matter of defense that plaintiff in error could set up if it saw fit. Therefore, it was incumbent upon it to so frame its plea as to set up a defense to some specific part of the policy under the chattel mortgage clause.

All of which we respectfully submit.

BENJ. MICOU,
JOHN H. TREADWELL,
E. D. TREADWELL,
*Counsel for Defendant in Error.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1918.

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## No. 308.

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AMERICAN FIRE INSURANCE CO.

*vs.*

KING LUMBER & MANUFACTURING CO.

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## REPLY BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

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It is contended in support of the motion to dismiss the writ of error in this case that this court has no jurisdiction, because, it is said, the Supreme Court of Florida, "by holding section 2765 of the General Statutes of the State *valid* and applicable to the contracts sued upon did not draw in question the validity of the statute of any State on the ground of its being repugnant to the Constitution, a thing it would have had to have done before this court would acquire jurisdiction." (Brief for defendant in error, page 11.)

> "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is

fairly open to denial and denied, the validity of such statute is drawn in question."

Baltimore, etc., R. Co. *vs.* Hopkins, 130 U. S., 210.

Miller *vs.* Railroad Co., 168 U. S., 131.

By the assignments of error filed in the Supreme Court of Florida it was contended that section 2765 of the General Statutes of Florida, as construed to be applicable to the contracts of insurance sued upon, encountered the following provisions of the Federal Constitution:

(1.) Section 1 of Article IV, requiring full faith and credit to be given to the laws of Pennsylvania.

(2.) The provisions of the 14th Amendment prohibiting (*a*) any State law which shall abridge the privileges or immunities of citizens of the United States; (*b*) any State from depriving any person of life, liberty or property without due process of law; and (*c*) the denial to any person of the equal protection of the laws; and

(3.) Article VI, requiring the judges in every State to be bound by the Federal Constitution, anything in the Constitution or laws of the State to the contrary notwithstanding.

The same contentions, in substance, are made in this court, and we do not understand the basis for the assertion that the validity of the statute was not drawn in question in the State court. The transcript shows that the same contentions were made in the court of first instance (Transcript, p. 26), and they have been consistently relied upon throughout the litigation. It is admitted at the outset of the majority opinion in the State court that the first five assignments of error "present questions arising under the Constitution of the United States." (Transcript, p. 43.) It is true that each assignment of error contained a statement that the policies were made in Pennsylvania, which was the fact, and that the Supreme Court of Florida, in substance, limited its discussion to the sole question whether or not the contracts of insurance

were Pennsylvania contracts, apparently assuming that to settle all the questions presented by the assignments of error, but it expressly decided against the contentions made by all these assignments of error. (Transcript, p. 55.)

Of course, if there were an independent non-Federal ground broad enough to sustain the decision of the State court, there would be no right of review in this court; but that is not the case, and we do not even understand it to be the rule that the decision of the State court, that the contracts were Florida contracts, is conclusive in this court, on the assignments of error presenting that question.

Postal, etc., Co. *vs.* Newport, 247 U. S., 464.
Royal Arcanum *vs.* Green, 237 U. S., 531.
New York, etc., Ins'ce Co. *vs.* Dodge, 246 U. S., 357.

In any event the statute attacked, as construed by the State court, is repugnant to the 14th Amendment to the Constitution of the United States in the respects pointed out in the main brief for plaintiff in error, as applied to the contracts of insurance, regarded as Florida contracts; hence it is impossible that there can be an independent non-Federal ground broad enough to sustain the decision of the State court. The State court rested its judgment solely upon the statute, and it could not do so without holding the statute valid, as against the objections urged to its constitutionality, so that it is not material to what extent the matter received discussion in the opinion of the State court.

Consolidated Coal Co. *vs.* Illinois, 185 U. S., 203.
Chicago, etc., Ins'ce Co. *vs.* Needles, 113 U. S., 574.
Yazoo, etc., R. Co. *vs.* Adams, 180 U. S., 1.
Chapman *vs.* Goodnow, 123 U. S., 540.

The fact, if it were a fact, that the contracts were Florida contracts, was not an *independent* ground for the decision of the State court, because it was inseparable from the contention as to the denial of full faith and credit to the laws of Pennsylvania. Much less was it an independent ground adequate to dispose of the case, because the contentions that the

statute, as construed, violated the 14th Amendment were independent of the question whether the contracts were made in Pennsylvania or not, although tne fact that they were made in Pennsylvania might accentuate the transgression.

The recital in each of the assignments of error filed in the State court that the policies "were made in the State of Pennsylvania" was a mere recital of a fact admitted by tthe declaration and exhibits thereto. (See policies and proofs of loss; Transcript, pages 5, 12.) The policies directly showed it on their faces. The proofs of loss, made parts of the declaration, directly averred it. It was admitted by the demurrer to the rejoinder on which judgment was rendered. (Transcript, page 32.) No one could suppose that there could or would be a contention to the contrary, as is, indeed, evidenced by the minority opinion, and the erroneous decision of the majority on this point could not eliminate the contentions presented by the assignments of error that the statute, as construed, violated the provisions of the Federal Constitution specially called to attention thereby.

## II.

A suggestion is made that the court, on this writ of error, should disregard some of the allegations of fact in the rejoinder, admitted by the demurrer thereto, upon which judgment was rendered, by taking judicial cognizance that the case of Swing *vs.* Munson, 191 Pa., 582, takes away the predicate for those allegations as to the effect of the laws of Pennsylvania; but, of course, this court on writ of error to the Supreme Court of Florida cannot take judicial notice of the laws or decisions of Pennsylvania, whatever they may be.

Hanley *vs.* Donoghue, 116 U. S., 1.
Lloyd *vs.* Matthews, 155 U. S., 222.

Respectfully submitted,

GUSTAVUS REMAK, Jr.,
JAMES F. GLEN,
*Counsel for Plaintiff in Error.*

(40284)

# AMERICAN FIRE INSURANCE COMPANY *v.* KING LUMBER & MANUFACTURING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 308. Argued April 22, 1919.—Decided May 19, 1919.

A fire insurance company transacting business in a State other than that of its incorporation is bound, in respect of such business, by the laws of the State where the business is transacted. P. 9.

A Pennsylvania fire insurance corporation, through a series of years issued a succession of policies on property in Florida, the business being done through local brokers who applied for the insurance, received and transmitted the premiums, drew their commissions from the company and were consulted by it as to the subject-matter insured and the other companies carrying insurance thereon. The policies, executed in Pennsylvania and sent to the brokers by mail, each contained a warranty for concurrent insurance throughout its term in another specified company, but, with the knowledge

of the brokers, a different company was substituted before the loss occurred. A law of Florida in existence throughout the transactions made any person who solicits insurance or procures applications therefor the agent of the insurer, anything in the application or policy to the contrary notwithstanding, and made one who receives or receipts for money from the insured to be transmitted to the insurer the agent of the latter "to all intents and purposes." *Held*, that, as applied to the case, so as to charge the company with the brokers' knowledge and effect a waiver of the warranty, the Florida law did not deny full faith and credit to the laws of Pennsylvania, or violate the privileges and immunities, due process, or equal protection clauses of the Fourteenth Amendment. *Id. New York Life Insurance Co.* v. *Head*, 234 U. S. 149, and *Mutual Life Insurance Co.* v. *Hilton-Green*, 241 U. S. 613, distinguished.

In the interest of justice the court may decide the merits without passing on a motion to dismiss that depends on a disputed proposition involving the merits. P. 14.

74 Florida, 130, affirmed.

THE case is stated in the opinion.

*Mr. Gustavus Remak, Jr.*, with whom *Mr. James F. Glen* was on the briefs, for plaintiff in error, made the following points:

No question as to the power to annex conditions to the right of a foreign corporation to do business in Florida is involved, because the law attacked applies alike to individuals, firms, and corporations, domestic and foreign.

The Florida court refused to accept the construction placed upon the statute by this court in *Mutual Life Insurance Co.* v. *Hilton-Green*, 241 U. S. 613, and the constitutionality of the act must be determined in view of the construction put upon it by the Florida court.

The construction of the statute by the Florida court conclusively makes the agent of an insured, who effects insurance for him, the agent of the insurer, with unlimited authority to bind the insurer, and forbids inquiry into the facts, in violation of § 1 of the Fourteenth Amendment.

Where matter of fact necessarily inheres in a cause of action, concerning which there is dispute, no statute can conclusively settle this matter of fact in favor of one class of litigants against another class.

It is one thing to attribute effect to the convention of the parties entered into under the admonition of the law, and another thing to give to circumstances, may be accidental, conclusive presumption, as proof establishing a result against property and liberty. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 566.

No Florida statute could operate on contracts effected in Pennsylvania by a Pennsylvania insurance company not doing business in Florida. Particularly could it not operate *in invitum* to make strangers agents of a foreign insurance company.

The policies were declared upon as Pennsylvania contracts, and were Pennsylvania contracts.

In case of doubt, parties are presumed to contract with reference to a law that will sustain their contracts in their entirety.

The provisions of the policies conclude the whole controversy if they are given effect.

Isolated transactions do not constitute doing business by a foreign corporation.

The Florida statute never was intended to raise special agents with limited authority into general agents.

The only cases tending to sustain the decision of the Florida court are *Stanhilber* v. *Insurance Co.*, 76 Wisconsin, 285, and *Brewing Co.* v. *Insurance Co.*, 95 Iowa, 31, decided in 1890 and 1895, respectively, and necessarily overruled by *Allgeyer* v. *Louisiana*, 165 U. S. 578, decided in 1897.

All the other cases cited by the Florida court belong to two classes: (1) Cases denying recovery on assessment policies, in favor of the insurer, on the ground they violated the policy of the law in the States where they were

sought to be enforced, which obviously are not authorities to support recovery by the insured, and (2) cases holding that a foreign insurance company doing business in another State through authorized agents submits itself to the laws of that State, which obviously have no application.

The request for information as to the property insured and the insurance thereon was a necessary incident in effecting the contract, which could not make the agents of the insured agents of the insurer.

The allowance of the usual broker's commission was immaterial.

The ultimate analysis is that a Florida statute could not be applied to the contracts of a Pennsylvania company that never left its domicile in Pennsylvania so as to subject itself to the laws of Florida.

*Mr. Benj. Micou*, with whom *Mr. John H. Treadwell* and *Mr. E. D. Treadwell* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Action on two fire insurance policies issued by plaintiff in error, to which we shall refer as the insurance company, to defendant in error, to which we shall refer as the lumber company. Each policy was for the sum of $2,500. There was total insurance on the property described in the policies of $45,750, and it was provided that the insurance company should only be liable for its pro rata share of any loss caused by fire under the provisions of the policies. The loss to the lumber company was $21,028.17, and the insurance company's pro rata share was on each policy $1,149.08.

There is not much dispute about the facts. There

is considerable dispute about the inferences from them, and facts and inferences were presented in a maze of pleadings which terminated in a demurrer to a rejoinder by the insurance company to replications of the lumber company to the pleas of the insurance company to the declaration in the case.

The court, in passing upon the demurrer, being of the view that § 2765 of the General Statutes of Florida (*infra*) was applicable, rendered judgment accordingly for the lumber company on the policies for the sum of $2,298.16, with interest at 8% from February 16, 1913, and the sum of $300 as a reasonable attorney's fee. The Supreme Court of the State affirmed the judgment.

The controversy is not especially complicated of itself, but it is made somewhat so by the manner of its presentation. The form and issue of the policies and the fact of fire and loss by it are not in dispute. The controversy centers in the relation of a particular firm of insurance brokers, residing at Tampa, Florida, to the insurance company and the lumber company, whether they were the agents of the former or of the latter under § 2765 of the statutes of Florida and whether they could dispense with the requirement of a clause in the policies called the warranty clause. That clause, therefore, and § 2765 (and, we may say, also § 2777, the Supreme Court of the State taking it into account) become essential elements of decision, and we exhibit them immediately.

Section 2765 is as follows:

"Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not

signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

Section 2777 is as follows:

"Any person who solicits insurance and procures applications therefor shall be held to be an agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

The warranty clause reads: "Warranted same gross rate terms and conditions as and to follow the American Central Ins. Co. of St. Louis, Mo., and that said Company has, throughout the whole time of this policy at least $5,000 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise, this policy shall be null and void."

The clause was not complied with. The lumber company carried concurrent insurance, but not in the Missouri company. The omission and substitution, it is alleged, were at the suggestion of Lowry and Prince, of Tampa, Florida, who were the agents of the insurance company and who, as such agents, caused and procured the lumber company to renew its policies from time to time, and finally the company, at the suggestion of Lowry and Prince, substituted other policies for policies in the Missouri company, with the knowledge of the insurance company, such other companies being equal in credit and responsibility to the Missouri company.

To these assertions the insurance company opposed contentions of law and fact, not, however, by any one pleading. The following are the facts it alleged, stated

narratively: The insurance company is a Pennsylvania corporation authorized to write and issue policies on property outside of Pennsylvania. Lowry and Prince, as brokers of the lumber company, applied for it (the lumber company) to the insurance company for insurance upon the lumber company's property. Policies were issued, and upon subsequent application policies were continued to be issued, including those in suit. They were executed in Philadelphia and delivered to Lowry and Prince by mail. They each contained a warranty such as has been set out as to the existence of concurrent insurance with an approved and designated company doing business in Florida, the names of the companies being changed from time to time at Lowry and Prince's request, and finally the name of the American Central Insurance Company of St. Louis, Missouri, being inserted, the ground of the request being that they were the agents of that company and would know of any cancellations by it. Lowry and Prince were not agents of the insurance company nor authorized "to represent it in any manner, shape or form," but as agents of the lumber company transmitted to the insurance company at its main office in Philadelphia the original and subsequent applications for policies, and as such agents received by mail the policies and transmitted the amount of premiums to the company less the usual brokers' commissions.

Besides statement of the above facts the rejoinder contained the following denials: That by issuing the policies to the lumber company the insurance company was engaged in the transaction of business in the State of Florida; that the lumber company paid Lowry and Prince, for the insurance company, any premiums on the policies; that Lowry and Prince were its agents; that prior to the furnishing of the proofs of loss by the lumber company the insurance company had any notice or

knowledge that the Missouri company had canceled its policies on the property insured and did not carry $5,000 on the identical subject-matter and risk; or that it advised or consulted with Lowry and Prince as to the advisability of the risk or otherwise, except to the extent that it did request information from them as to the subject-matter insured and as to the companies carrying insurance thereon.

It will be observed that the rejoinder raised no question under the Constitution of the United States. That was done by a demurrer to the replications of the lumber company and was expressed, in effect, as follows: "The legal predicate for the conclusion that Lowry and Prince were the agents of the defendant [the insurance company] rests upon § 2765 of the General Statutes of Florida" and, further, if the section be so construed it violates (a) the full faith and credit clause of the Constitution of the United States in that the State of Florida would thereby deny full faith and credit to the laws of the State of Pennsylvania, and so construed, it violates (b) the privilege and immunities clause, the due process clause and the equal protection clause of the Fourteenth Amendment.

Some other matters were set forth in the demurrer which we think are not material to mention. They only express what is expressed in other places, that Lowry and Prince were not the agents of the insurance company but were and must be considered as agents of the lumber company; and alleged that the policies were Pennsylvania contracts, complied with the Pennsylvania law, and that to construe them as the lumber company contends they should be construed would be to deny that law full faith and credit.

The ultimate question, then, is the relation in which the insurance brokers stood to the respective companies. The case would seem, therefore, not to be of broad compass nor to justify the elaborateness of argument that

has been addressed to it. We certainly do not consider a review of the many cases cited by the insurance company necessary to be made.

The Florida law first demands attention. It is explicit in its declaration. It was in existence when the policies were executed, and when the policies of which they are the successors were executed. There was, therefore, a course of conduct and transactions through a succession of years—not a single instance or an isolated one, as the insurance company contends, but a number of instances and all in relation. Nor does the case present an attempt of the Florida law to intrude itself into the State of Pennsylvania and control transactions there; it presents simply a Pennsylvania corporation having the permission of that State to underwrite policies on property outside of the State and the exercise of the right in Florida. And necessarily it had to be exercised in accordance with the laws of Florida. There was no law of Pennsylvania to the contrary—no law of Pennsylvania would have power to the contrary. There is no foundation, therefore, for the contention that full faith was not given to a law of Pennsylvania, nor of a denial of a right to a citizen [1] of Pennsylvania, nor of a denial of due process or the equal protection of the law.

The law of Florida, it is true, puts an element into the transactions of the parties to insurance and makes the person who solicits insurance and procures applications the agent of the party issuing the policy, and this against any provision in the policy to the contrary. And, even farther, the law makes the person who receives or receipts for money from the insured to be transmitted to the insurer the agent of the latter.

[1] A corporation is not a citizen within the meaning of the provision of the Constitution which secures the privileges and immunities of citizens against state legislation. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557–561.

There is nothing unreasonable in the conditions; they regulate the transactions, do not prevent them, or even embarrass them by ambiguity. A company is informed what it may incur by underwriting insurance in the State, and it cannot assert surprise or ignorance—certainly the insurance company in the present case cannot do so. It had knowledge or must be charged with knowledge of the law. It dealt through Lowry and Prince during a succession of years, permitted them to receive and receipt for premiums and transmit them to it, and consulted with them about the subject-matter and with what companies the risk was divided. It accepted the benefit of their action while premiums were being received and new policies were being issued. It is rather late to reject the consequence. Indeed, the attempt at rejection suggests the possibility of the occurrence of examples of like kind and may indicate the reason for the enactment of the law—suggest that its purpose was to preclude confusion and dispute as to the relation of the broker to the parties respectively, and to preclude an underwriter, after using the agency, from denying responsibility.

These deductions are not contravened by the cases cited by the insurance company. Its basic proposition is that a State has no jurisdiction of persons or property beyond its borders or of contracts executed beyond its borders, and it invokes the proposition by the assertion that the policies were Pennsylvania contracts and being such were immune from regulation by Florida, and *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, is adduced as typical. In that case the principle was expressed that the laws of a State could not be extended beyond its confines, and it was concretely applied in the case to deny to the State of Missouri the right to extend its authority into the State of New York and there forbid a citizen of New Mexico and a citizen of New York from

making a loan agreement in New York simply because it modified a contract originally made in Missouri. The difference between that case and this is manifest, and the other cases relied on are not nearer in point. The Florida statute does not attempt to invade Pennsylvania and exercise control there. It stays strictly at home in this record and regulates the insurance company when it comes to the State to do business with the citizens of the State and their property.

It is true the insurance company contends that its transactions were all isolated ones, not such as to constitute doing business in the State, and, besides, that it had no permission to be in the State and could not be presumed to be there against its laws; and, besides, again, its policies declared that they were to be effective in Pennsylvania. Cases are cited which are assumed to support these contentions. A review of them is unnecessary. The contentions confuse a simple situation and would withdraw from the jurisdiction of Florida transactions there and give them another theatre and another control. In other words, would displace the law by the very things it precludes from such operation.

The challenging response of the insurance company is that to give the law that effect is to bring it under the condemnation of *Mutual Life Insurance Co.* v. *Hilton-Green*, 241 U. S. 613. That case considered the Florida law, but did not deny its legality nor decide that the State could not make the local broker, if the designated conditions existed, the agent of an underwriter. It only decided that the knowledge of the agent of misrepresentation and fraud by the insured could not be imputed to the underwriter. It was naturally held that such imputation was a perversion of the rule which imputes an agent's knowledge to his principal and its underlying reason "that an innocent third party may properly presume the agent will perform his duty and report all facts which affect

the principal's interest." To so extend the law would be a perversion of it, not a use to it—make it not a regulation but an oppression. The present case is not open to that condemnation. The lumber company was an "innocent third party" and could properly presume that Lowry and Prince would and did perform their duty and report to the insurance company their knowledge of the concurrent insurance that was carried on the property, and that the provision requiring it was equivalently complied with. And there was not dereliction in the agents; the substituted security was not insufficient. If the power that was exercised had no binding effect on the insurance company it would be difficult to imagine what would have under the Florida statute. Nor can we yield to the contention that to so construe it is "to raise special agents with limited authority into general agents."

The insurance company, however, insists that the policies constituted the contracts between it and the lumber company and that they were not subject to subsequent variation, and *Lumber Underwriters* v. *Rife*, 237 U. S. 605, is cited. The case is not apposite. There was an attempt, in that case, to vary the written words of a contract by a concurrent parol agreement; in other words, and to quote those of the case, to establish by "parol proof that at the very moment when the policy was delivered" one of its provisions was waived. It was not decided that there could not be a subsequent waiver of a provision of a policy nor that the convention of the parties could not be made subject to a law of the State.

Finally the insurance company contends that the Florida law, as aided by the decision of the Supreme Court of the State, gives "the agent of the insured unlimited authority to bind the insurer, and forbids inquiry into the facts, in violation of § 1 of the 14th Amendment." Phases of the contention are covered by what we have said, and its main foundation that inquiry into the facts is forbidden

is not tenable. The facts were exhibited in the pleadings and they showed that the conditions for the application of the law existed. They showed insurance effected through the brokers, Lowry and Prince, their communication with the insurance company, their transmission of money to it, the payment of their commission by the company, and the consultation of the company with them as to the "subject matter insured, and the companies carrying insurance thereon," to use the language of the rejoinder.

A motion to dismiss is made on the ground that the federal questions raised were not passed upon by the courts of the State, but that the courts rested their decision on the fact that the contracts were made in Florida rather than in Pennsylvania. That, however, was a disputed proposition and the motion so far involved the merits of the case that we have considered, under such circumstances, justice would be better served by going into the merits. *Beaumont* v. *Prieto*, 249 U. S. 554.

*Judgment affirmed.*